Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA, Complainant, v. ALABAMA POWER COMPANY, Defendant.	Proceeding No. 19-119 Bureau ID No. EB-19-MD-002

POLE ATTACHMENT COMPLAINT REPLY

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* Certain information in this Pole Attachment Complaint Reply and its supporting Affidavits and Declaration has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

I. SUMMARY

Alabama Power's Answer confirms that the Commission should apply its new telecom rate presumption and force a reduction of Alabama Power's egregiously high rental rates. Alabama Power takes issue with the presumption itself—arguing that it can never apply to existing attachments made to existing poles under existing agreements. But the Commission already rejected this argument when it sought to promote broadband deployment by eliminating the "outdated rate disparities" that persist under existing agreements, like the 1978 Joint Use Agreement ("JUA") between AT&T and Alabama Power.[1] The Commission should promptly enforce its new telecom rate presumption in this case.

Alabama Power admits that it has been charging AT&T rental rates that are up to [redacted] *times* the approximately [redacted] new telecom rental rate that applies to AT&T's competitors. And it does not come close to rebutting the Commission's presumption that the same new telecom rate should be charged AT&T, let alone provide clear and convincing evidence that AT&T receives net material benefits under the JUA that advantage AT&T over its competitors. Instead it offers factual claims riddled with error, hypotheticals that are not grounded in reality or supported by actual data, and its own stated belief that AT&T should pay the JUA rates until AT&T removes its facilities from more than 630,000 poles regardless of Commission rulings. Indeed, Alabama Power provides just two redacted license agreements as purported "evidence" of AT&T's competitive advantages, while it hides as many as [redacted] that have governed AT&T's competitors over the last decade. It provides no source data to substantiate its claims, questions why it is not enough to simply allege that "advantages" exist, and accuses AT&T of bad faith because AT&T held firm in its request for a just and reasonable rate that would set it on par with its competitors.

[1] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) ("*Third Report and Order*").

Lacking any legal or factual basis for its exceptionally high pole attachment rates, Alabama Power tries to sow confusion, obscure the facts, and skirt settled precedent. But all its writing and revisionist history cannot conceal that Alabama Power is trying to turn back the clock on the Commission's deployment and competition initiatives. For nearly a decade, the Commission has worked to "establish rental rates for pole attachments that are as low and close to uniform as possible … to promote broadband deployment."[2] Alabama Power argues that AT&T should instead pay over [redacted] more per pole than its competitors, amounting to a more than [redacted] million annual impact. Alabama Power defends this extraordinary premium with dubious attempts to quantify: (1) the difference between a hypothetical world in which Alabama Power shares poles with communications attachers and one in which it does not, and (2) pole space that AT&T does not occupy and that cannot be assigned to communications attachers under FCC precedent. Each of these arguments is 100% contrary to the Commission's objectives and the principle of competitive neutrality that has motivated its rate reforms. Neither differentiates AT&T from its competitors nor detracts in any way from the fundamental principle that an approximately $8 new telecom rate will "fully compensate [Alabama Power] for costs caused by third-party attachments," including AT&T's.[3]

The Commission should soundly reject Alabama Power's arguments, enforce its new telecom rate presumption, and refund the excess amounts Alabama Power has unlawfully collected since 2012. In so doing, the Commission will take a valuable step forward in its decade-long effort to promote deployment through competitively neutral rates.

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[2] National Broadband Plan at 110 (2010).

[3] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5321 (¶ 183 n.569) (2011) ("*Pole Attachment Order*") (quoting National Broadband Plan at 110).

II. ARGUMENT

A. Alabama Power Seeks To Reverse The 2018 *Third Report And Order* And Undo Decades Of Precedent.

Alabama Power's Answer evidences its continued disregard for a decade of Commission rate reforms, which it continues to argue are unlawful and unreasonable.[4] The Commission's new telecom rate presumption was adopted for this precise reason: to ensure that "similarly situated attachers … pay similar pole attachment rates for comparable access" in spite of the intransigence of electric utilities.[5] Alabama Power's Answer confirms that the new telecom rate presumption applies, and that Alabama Power cannot lawfully charge its far higher rental rates.

1. The Commission's New Telecom Rate Presumption Applies To Existing Agreements, Including The JUA.

Alabama Power tries to avoid application of the new telecom rate presumption to the JUA with three specious arguments that would require the Commission to reverse almost a decade of precedent. *First*, Alabama Power argues that the JUA is not a "newly-renewed" agreement entitled to the presumption because it "cannot be 'renewed'" and cannot be placed "in 'evergreen' status."[6] This argument fails because, as explained in AT&T's Complaint and ignored in Alabama Power's Answer, the JUA "extended" after the effective date of the Commission's *Third Report and Order*.[7] In the *Third Report and Order*, the Commission held that the new telecom rate presumption applies to "newly-renewed" agreements which, it explained, include "agreements that are automatically renewed, *extended*, or placed in evergreen

[4] *See, e.g.*, Answer ¶ 45 (still challenging the lawfulness of the 2011 *Pole Attachment Order* that was affirmed on appeal); Affirmative Defense 7.

[5] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

[6] *See* Answer ¶¶ 11, 25.

[7] *See* Compl. ¶ 11.

status" following the *Order*'s effective date.[8] By its terms, the JUA automatically extended after that date; it states that it "shall continue in full force and effect through June 1, 1988, *and shall continue thereafter* until terminated."[9] The words "continue" and "extend" are synonyms.[10] And Alabama Power admits that the JUA "continues in effect today."[11] Thus, after the JUA automatically renewed on June 1, 1988, it automatically extends each day thereafter because it has not been terminated.

Moreover, Alabama Power is wrong about the inability of the JUA to renew.[12] The JUA *renewed* when its initial term expired in 1988[13] and it continues to automatically renew each day that it is extended.[14] And Alabama Power is simply incorrect that the JUA cannot be "placed in evergreen status" *because* it includes an "evergreen" provision.[15] To the contrary, the Commission found that the presumption applies in "circumstances where an agreement has been terminated and the parties continue to operate under an 'evergreen' clause," meaning a clause that gives "electric utilities … no right to demand removal of attachments upon termination."[16] Thus, the JUA is squarely covered by the new telecom rate presumption.

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[8] *Third Report and* Order, 33 FCC Rcd at 7770 (¶ 127 n.475) (emphasis added).

[9] *See* Compl. ¶ 11; Compl. Ex. 1 at ATT00108 (JUA, Art. XV).

[10] *See* Compl. ¶ 11 ("'Continue' means '[t]o carry further in time, space or development: *extend*' and 'extend' means 'to lengthen, prolong; to *continue* …'") (citations omitted).

[11] Answer ¶ 25.

[12] *See id.* ¶¶ 11, 25.

[13] *Id.* ¶ 11 (admitting that the JUA may have "renewed" in 1988); *see also* Compl. Ex. 1 at ATT00108 (JUA, Art. XV) (stating that the JUA's initial term expired in 1988).

[14] *See* Compl. ¶ 11 & n.16 ("Renew" means to "repeat so as to reaffirm" or "begin again") (citations omitted).

[15] *See* Answer ¶¶ 11, 25 (arguing that the presumption should not apply because the JUA includes an evergreen provision).

[16] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

Second, Alabama Power argues that the JUA is not entitled to the presumption because it is not a "pole attachment contract"[17] and does not include "pole attachment rates."[18] Alabama Power describes the JUA as an "infrastructure cost sharing arrangement" with "cost-sharing provisions."[19] Simply re-labeling the JUA does not remove it from the Commission's *Order* requiring application of the new telecom rate presumption, as the JUA still governs the parties' attachments to each other's poles and sets the "annual rental rates" for that use.[20] And although Alabama Power argues that replacing the JUA rates with proportional new telecom rates would not appropriately "share the cost" of the network,[21] that is not true. A properly calculated new telecom rate is "*fully compensatory*" to the pole owner.[22] That does not change when the attacher also owns poles.[23] Instead, the new telecom rate formula, properly applied to each party's use of the other party's poles, will "fully compensate [each] pole owner for costs caused by [the other party's] attachments."[24] Thus, regardless of how Alabama Power describes the

[17] Answer ¶ 9.

[18] *Id.* ¶ 8.

[19] *See id.*, Executive Summary; *see also* Answer ¶¶ 3, 8.

[20] *See, e.g.*, Compl. Ex. 1 at ATT00116 (JUA, App'x B).

[21] *See, e.g.*, Answer ¶ 10.

[22] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110) (emphasis added); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987).

[23] Alabama Power makes inconsistent claims, arguing both that AT&T is required to own a "contractual share of the joint use network" *and* that "AT&T enjoys the contractual benefit of *not* being required to maintain ownership of [redacted] of the jointly used network." Answer ¶ 10 (emphasis added). The JUA does not include a contractual pole ownership requirement. Compl. Ex. 1 at ATT00103-119 (JUA).

[24] *Pole Attachment Order*, 26 FCC Rcd at 5324 (¶ 191). Alabama Power claims that AT&T would pay lower *net* rent if it owned more poles because it would pay rent on fewer poles. Answer ¶ 10. But paying rent on fewer poles would not reduce the unreasonableness of the JUA rates on a per-pole basis, and the JUA rates would still overcompensate Alabama Power. *See* Reply Ex. C at ATT00341 (Reply Aff. of M. Peters, July 19, 2019 ("Peters Reply Aff.") ¶ 17).

JUA, it is a newly renewed "joint use agreement" that the Commission has rightly found is presumptively entitled to a just and reasonable, new telecom rate.[25]

Third, Alabama Power argues that the new telecom rate presumption should not apply to existing poles because they should *always* be governed by the JUA rates.[26] The Commission has also rejected this argument, finding instead that the new telecom rate presumption *would* "impact privately-negotiated agreements."[27] As the Commission explained, a federal statutory right "may not be defeated by private contractual provisions."[28] Any other standard "would subvert the supremacy of federal law over contracts."[29]

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[25] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127) (applying new telecom rate presumption to "newly-negotiated and newly-renewed joint use agreements"). Alabama Power has tried unsuccessfully to recharacterize joint use agreements for more than a decade in its effort to avoid the Commission's rate reforms. *See, e.g.*, Reply Comments at 4 (Apr. 22, 2008) (arguing that ILECs are not entitled to just and reasonable rates because joint use agreements reflect "negotiated infrastructure cost sharing principles"); Reply Brief at 16, *AEP v. FCC* (D.C. Cir. Apr. 9, 2012) (arguing that "joint use agreements … are infrastructure cost sharing agreements").

[26] *See, e.g.*, Answer ¶ 11 ("[T]he Commission's presumptions cannot, as a matter of law and logic, apply to joint use poles in existence as of the effective date of the new rule."); *id.* ¶ 40 ("Alabama Power denies that AT&T is entitled to the new telecom rate with respect to any existing joint use poles at any time in the past or on a going-forward basis."); *id.* ¶ 42 ("The Commission should instead find that the cost-sharing provisions of the existing joint use agreement … are just and reasonable.").

[27] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475); *see also id.* (¶ 127 & n.479) (rejecting argument from Southern Company "that we should not apply the presumption to existing agreements"). The Commission thus again rejected Alabama Power's argument that "just and reasonable rates" for existing poles "would be tantamount to forced access at regulated rates" contrary to the absence of a right of access for ILECs in the Pole Attachment Act. *See* Answer ¶ 11. In 2011, the Commission explained that "[a]lthough incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, … where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)." *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

[28] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (citation omitted).

[29] *Id.* (internal quotation and alternation omitted); *see also In the Matter of Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, 11908 (¶ 105) (2010) ("The Commission would not

Indeed, as the Commission explained, the presumption must apply to existing attachments on existing poles under existing JUAs because there lies the "outdated rate disparities" that the presumption is intended to eliminate.[30] Alabama Power would instead require AT&T to pay the egregiously high JUA rates on more than 630,000 poles in perpetuity—or incur the cost to deploy an unnecessary, unwanted, and duplicative pole network.[31] Nothing could be more contrary to the Commission's goal of reducing infrastructure costs to promote deployment.[32] As a result, the new telecom rate presumption does not, and cannot, have an exception for existing poles.

2. Alabama Power Disregards Commission Rulings That Require That Rates Be Set Based On The Space Occupied On The Pole.

Because the presumption applies, AT&T should be charged a properly calculated new telecom "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)."[33] Alabama Power admits that it has been charging AT&T's competitors a new telecom rate of about [redacted][34] But Alabama Power argues that if it is forced to charge AT&T a new telecom rate, that rate should be

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be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

[30] *Third Report and Order*, 33 FCC Rcd at 7767, 7770 (¶ 127).

[31] *See, e.g.*, Answer ¶ 11 ("AT&T … can remove its facilities from any or all of those 630,000 poles whenever it chooses and it will no longer be required to pay [the JUA] 'rate' with respect to such poles."); Answer ¶ 25 (stating that Alabama Power will "**never**" agree to a joint use agreement "if the most it could recover [from AT&T] was the one-foot CATV or telecom rate (old or new)") (emphasis in original).

[32] Reply Ex. E at ATT00413-414 (Decl. of C. Dippon, July 19, 2019 ("Dippon Reply Decl.") ¶ 57).

[33] 47 C.F.R. § 1.1413(b).

[34] Answer ¶ 12.

multiplied by [redacted] to account for the allegedly greater amount of space AT&T uses on the pole as compared to its competitors.[35] Alabama Power is wrong on many counts.

Alabama Power claims that AT&T occupies [redacted] feet of pole space by combining 3.33 feet of safety space "constructively occupied" on the pole with [redacted] feet of space purportedly "physically occupied," although its measurements are based on cable sag mid-span (*i.e.*, mid-way between two poles).[36] Neither calculation is accurate.

First, Commission rules permit Alabama Power to charge attachers only for the physical space occupied by their attachments on the pole, which is the "Space Occupied" input to the "Space Factor" in each FCC rate formula.[37] Alabama Power concedes as much when it comes to AT&T's competitors, acknowledging that it cannot charge them for the 3.33 feet of safety space because the Commission found the space "is usable and used *by the electric utility*."[38] Yet, somehow Alabama Power argues that AT&T is the cause of that space, and should be allocated it.[39] This argument is nonsensical. The safety space "is usable and used by the electric utility"

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[35] *Id*.

[36] *See, e.g.*, *id.* ¶¶ 12, 29.

[37] 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); *see also* 47 C.F.R. § 1.1406(d)(1) (calculating cable rates based on "Space Occupied"); 47 C.F.R. § 1.1409(e)(2) (2010) (calculating preexisting telecom rates based on "Space Occupied").

[38] Answer ¶ 12 n.39 ("Given that the Commission has already determined that CATV and CLEC attachers should not bear this cost, this cost must fall to AT&T …."); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") (holding "the 40-inch safety space … is usable and used by the electric utility"); *Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 FCC.2d 63, 68 (¶¶ 10-11) (1981) (rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied").

[39] *See* Answer ¶¶ 12, 20, 26, 29.

no less on poles shared with AT&T than on poles shared with AT&T's competitors.[40] In fact, the "safety space" is rarely even adjacent to AT&T's facilities, which are typically the lowest on the pole, whereas the safety space divides Alabama Power's facilities from the highest communications attachments on the pole.[41]

Second, Alabama Power improperly derives the [redacted] feet of pole space it alleges that AT&T "physically" or "actually occupied" based on "mid-span sag" in AT&T's cables at the mid-point between two poles rather than based on space actually used on the pole.[42] Alabama Power acknowledges that it cannot charge AT&T's competitors for any "mid-span sag" in their cables.[43] For good reason. As referenced above, the Commission's rate formulas are based on "space occupied"—meaning the "actual physical attachment" to the pole.[44] Mid-span sag, which can be 50 or more feet from the pole[45]—whether the result of a heavier cable,[46] overlashed facilities,[47] or a leaning pole—cannot be used to allocate more space to the attacher or charge a

[40] *See Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51); *see also* Reply Ex. C at ATT00336 (Peters Reply Aff. ¶ 9).

[41] *See, e.g.*, Reply Ex. B at ATT00328 (Reply Aff. of D. Miller, July 19, 2019 ("Miller Reply Aff.") ¶ 19); Reply Ex. E at ATT00391-392 (Dippon Reply Decl. ¶ 16).

[42] *See, e.g.*, Answer ¶ 18; *see also* Answer Ex. C at APC000077-78 (Morgan Decl. ¶ 7) (explaining that the [redacted] feet was measured from the "average height of AT&T's highest attachment" to the "average mid-span clearance of AT&T's lowest attachment").

[43] *See* Answer Ex. C at APC000086 (Morgan Decl., Ex. C-1) (measuring the space occupied by "communication" attacher—and, indeed, by Alabama Power itself—without reference to mid-span sag).

[44] *Television Cable Serv.*, 88 FCC.2d at 68 (¶ 11).

[45] *See* Reply Ex. C at ATT00336 (Peters Reply Aff. ¶ 10).

[46] *See* Answer Ex. A at APC000031 (Boyd Decl. ¶ 13) (admitting that "thicker, heavier bundles do not [necessarily] require more vertical space on a pole").

[47] Overlashing, according to Alabama Power's sister company, Georgia Power, is done by "multiple attaching entities"—not just ILECs. *See* Ex Parte Notice, WC Docket No. 17-84 (Mar.

higher rental rate.[48] Sag is endemic to all aerial facilities, but it "does not increase the amount of space actually occupied by the attachment" on the pole.[49]

At a minimum, Alabama Power seeks to attribute to AT&T's use, and charge AT&T for, the full 2.5 feet of space that AT&T is *allocated* under the JUA, even if AT&T does not occupy the space.[50] But charging AT&T a rate based on 2.5 feet of allocated pole space would violate Commission regulations because the Commission's rate formulas are based on "space *occupied,*" not space allocated.[51] This makes sense, as allocated space can diverge substantially from used space.[52] When that occurs, relying on space physically occupied ensures that attachers are charged for their actual use and avoids the potential for overcharging, undercharging, and double recovery.

19, 2018). The result, according to Georgia Power's filing, is an "increased bundle size" and an "increase in the size of individual fiber cables." *Id.*

[48] *Consolidated Partial Order*, 16 FCC Rcd at 12142-43 (¶¶ 77-78). *See also Implementation of Section 703(e) of the Telecommunications Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6807-08 (¶ 64) (1998) ("[O]verlashing one's own pole attachment should be permitted without additional charge. To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices.").

[49] *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78); *id.* (¶ 77) ("The statutory language prescribes that we allocate costs based on space occupied, not load capacity."). Alabama Power's claims about the sag experienced by AT&T's facilities is also outdated, and does not account for AT&T's transition to lightweight fiber facilities that are essentially identical to its competitors' facilities. *See, e.g.*, Reply Ex. B at ATT00325-327 (Miller Reply Aff. ¶¶ 16-18).

[50] *See* Answer ¶ 12; *see also* Compl. Ex. 1 at ATT00119 (JUA, App'x B, Ex. 2).

[51] 47 C.F.R. § 1.1406(d) (emphasis added); *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78) ("determination of the amount of space occupied" is based on "the amount of space actually occupied"); *see also, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662) (expecting that ILECs and electric utilities would pay "the same proportionate rate … given [their] relative usage of the pole (such as the same rate per foot of *occupied space*)") (emphasis added).

[52] *See, e.g.*, Compl. Ex. B at ATT00048-49 (Miller Aff. ¶ 17); Compl. Ex. C at ATT00066 (Peters Aff. ¶ 10).

Absent statistically valid survey data about the actual average space occupied, the presumption is that communications attachers occupy 1 foot of space.[53] Alabama Power provided no data at all to rebut the presumption, relying instead on an unverifiable report that a contractor reported a [redacted] feet mid-span measurement for a sample of unidentified poles,[54] some outdated materials that do not reflect AT&T's decades-long transition to fiber facilities (which further reduces weight load and minimizes sag),[55] and other materials that only confirm that AT&T and its competitors deploy comparable facilities requiring comparable space.[56] Ironically, Alabama Power cannot distinguish AT&T's facilities from its competitors' facilities, as evidenced by the fact that its Answer mistakenly identifies AT&T's competitors' facilities as those of AT&T.[57] For these reasons, the new telecom rates for AT&T must be calculated—as they are for AT&T's competitors—based on the Commission's presumptive 1-foot of pole space occupied.

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[53] 47 C.F.R. § 1.1410; *see also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002).

[54] *See* Answer Ex. C at APC000077 (Morgan Decl. ¶ 7) (stating that Pike Engineering provided data relating to 4,303 poles about the "average height of AT&T's highest attachment" and the "average *mid-span* clearance of AT&T's lowest attachment") (emphasis added).

[55] *See* Answer Ex. E at APC000172-182 (Arnett Decl., Exs. E-3 to E-6); *see also* Reply Ex. B at ATT00325-327 (Miller Reply Aff. ¶¶ 16-18); Reply Ex. C at ATT00337 (Peters Reply Aff. ¶ 11).

[56] *See, e.g.*, Reply Ex. D at ATT00349 (Reply Aff. of C. Little, July 18, 2019 ("Little Reply Aff.") ¶ 8) (identifying photographs that identify AT&T's competitors' facilities as AT&T's); *see also* Answer Ex. E at APC0000196, 0000202 (Arnett Decl., Ex. E-8) (measuring AT&T and cable attachments within 14 inches, and within 8 inches, respectively).

[57] Alabama Power submitted photographs of 13 poles with its Answer. *See* Answer Ex. A at APC000042-54 (Boyd Decl., Ex. A-2). At four locations, Alabama Power misidentified the attachments, stating that facilities belong to AT&T when they do not. *See* Reply Ex. D at ATT00349, -352, -355, -357, -360 (Little Reply Aff. ¶ 8, 15, 23, 29, 37). Alabama Power's descriptions of the poles and facilities depicted in the photographs are riddled with other mistakes and false claims as well. *See id.* at ATT00349-360 (Little Reply Aff. ¶¶ 8-38).

Alabama Power further inflates the rates it relies on by multiplying its new telecom rates by the alleged [redacted] feet of pole space used.[58] This would be improper even if Alabama Power had valid survey data showing that AT&T occupied more than 1 foot of space, on average, on Alabama Power's poles.[59] If a pole owner has sufficient survey data to show that an attacher occupies more than 1 foot of space, on average, it may adjust the "space occupied" input in the rate formula to account for that additional space.[60] It may not calculate a 1-foot rate and multiply it by the amount of space occupied.[61] Doing so would violate the statutory requirement that the unusable space on the pole be *equally* divided among attaching *entities*—without regard to the amount of pole space occupied.[62] The appropriate new telecom rate for AT&T, therefore, is the same approximately $8 per pole rate that applies to its competitors.[63] Alabama Power's Answer

[58] *See, e.g.*, Answer ¶ 12; Answer Ex. B at APC0000058 (Declaration of Wesley L. Conwell, Jr. ("Conwell Decl.") ¶ 10).

[59] *See* Reply Ex. A at ATT00303-304 (Reply Aff. of D. Rhinehart, July 19, 2019 ("Rhinehart Reply Aff.") ¶ 13); Reply Ex. E at ATT00391 (Dippon Reply Decl. ¶ 15).

[60] *See* 47 C.F.R. § 1.1406(d); *see also* Reply Ex. A at ATT00302-303 (Rhinehart Reply Aff. ¶ 12); Reply Ex. E at ATT00391 (Dippon Reply Decl. ¶ 15).

[61] *See* Answer ¶ 12; *see also* Answer Ex. B at APC0000058 (Conwell Decl. ¶ 10).

[62] 47 U.S.C. § 224(e)(2) (requiring "equal apportionment of [unusable space] costs among all attaching entities"); *see also In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 57) (1998) (rejecting proposal "that entities using more than one foot be counted as a separate entity for each foot or increment thereof" because "[w]e are … convinced that the alternative proposal is inconsistent with the plain meaning of Section 224(e) which apportions the cost of unusable space 'under an equal apportionment of such costs among all attaching entities.'"); *see also id*. at 6800 (¶ 45) ("Under Section 224(e)(2), the number of attaching entities is significant because the costs of the unusable space assessed to each entity decreases as the number of entities increases.").

[63] *See* Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 13); Reply Ex. A at ATT00297, -299-300 (Rhinehart Reply Aff. ¶¶ 3, 7); Reply Ex. E at ATT00385, -414 (Dippon Reply Decl. ¶¶ 3, 57).

thus confirms that the near-[redacted] JUA rates it charges AT&T are [redacted] *times* higher than the approximately $8 new telecom rate that presumptively applies.[64]

3. Alabama Power Cannot Rebut The New Telecom Rate Presumption With Unrealistic Hypotheticals And Alleged Advantages That AT&T's Competitors Also Enjoy.

Alabama Power did not provide "clear and convincing evidence that [AT&T] receives net benefits under its pole attachment agreement with [Alabama Power] that materially advantage [AT&T] over other telecommunications attachers."[65] Therefore, by law, the new telecom rate applies.[66] Alabama Power's attempt to rebut the presumption relies primarily on its own word—questioning why it was not enough to simply "identif[y] eight specific advantages,"[67] failing to provide any source data to substantiate any of its allegations or quantifications,[68] and ignoring as many as [redacted] of its license agreements.[69] Alabama Power also effectively abandons advantages it previously claimed, stating that it does not intend to quantify a value for them.[70]

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[64] *See* Compl. Ex. A at ATT00007, -13-27, -37 (Rhinehart Aff. ¶ 13 & Exs. R-1, R-3); Reply Ex. A at ATT00297, -299-300 (Rhinehart Reply Aff. ¶¶ 3, 7).

[65] *See Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125); *see also*, *e.g.*, 7A Fed. Proc., L. Ed. § 17:36 (Clear and convincing evidence is "evidence so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.").

[66] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125).

[67] Answer ¶ 14.

[68] *See, e.g.*, Answer Ex. C at APC000080-81 (Morgan Decl. ¶¶ 12-14) (providing range of "figures from our work order system" without further detail of the costs covered); Answer Ex. D at APC000098-104 (Metcalfe Aff. ¶¶ 29-31) (basing quantifications on "discussions" with Mr. Powell, Ms. Boyd, and Ms. Morgan, rather than on affidavits, declarations, or source data).

[69] Answer ¶ 14 (declaring its two recent license agreements "representative"); Alabama Power Response to Interrogatories at APC000002-12 (Ex. 1); *see also* Reply Ex. A at ATT00315 (Rhinehart Reply Aff. ¶ 34).

[70] *See, e.g.*, Answer ¶¶ 20 ("Alabama Power does not intend to quantify this [alleged] benefit."), 23 ("Alabama Power … does not intend to quantify the [alleged] economic benefit to AT&T.").

First, Alabama Power claims that AT&T is advantaged because Alabama Power installed 40-foot joint use poles when it could have installed 30- or 35-foot non-joint use poles to meet its own service needs.[71] This argument is specious. AT&T is not advantaged over its competitors because "Alabama Power's carrying cost of joint use poles is … higher than the carrying cost of non-joint use poles."[72] AT&T *and* its competitors require Alabama Power's joint use poles.[73]

Alabama Power tries to salvage this alleged benefit by claiming that AT&T received a "massive benefit" because of its first-in-time status.[74] Alabama Power reasons that, if it had not installed joint use poles, AT&T would have been the first communications attacher seeking to attach—and so AT&T would have had to "pay make-ready costs to replace virtually all of Alabama Power's poles with taller poles."[75] Alabama Power then relies on its discredited replacement cost methodology to allege that the value associated with its installation of joint use poles is [redacted] per pole per year—the amount it thinks it would have cost if AT&T had replaced all of Alabama Power's poles with taller poles at current day prices.[76]

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[71] *See, e.g.*, *id.* ¶ 15 (arguing that "it would have been imprudent for Alabama Power to invest in taller/stronger infrastructure than necessary for its own service needs").

[72] *See id.* Executive Summary. *But see* Reply Ex. A at ATT00314-315 (Rhinehart Reply Aff. ¶¶ 30-32).

[73] *See, e.g.*, Reply Ex. B at ATT00328-329 (Miller Reply Aff. ¶ 21); Reply Ex. C at ATT00333-334 (Peters Reply Aff. ¶ 6).

[74] *See* Answer ¶ 15.

[75] Answer Ex. D at APC000137 (Metcalfe Aff., Ex. D-4.1); *see also* Answer ¶ 15 (alleging that AT&T benefited because it "was not required to pay make-ready to access those poles in the first instance").

[76] *See* Answer Ex. D at APC000137 (Metcalfe Aff., Ex. D-1) (assuming replacement of 100% of Alabama Power poles to which AT&T is attached); *see also Ala. Cable Telecommunications Ass'n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12234 (¶ 57) (2001) ("Respondent [Alabama Power Company]'s final attempt at appraisal, using replacement costs … also fails."); *see also* Answer Ex. D at APC000103-04 (Metcalfe Aff. ¶ 31) (basing calculation on replacement costs provided by Sherri Morgan for the 2014 to 2018 time period). Of course, AT&T, cable

This makes no sense. AT&T could have attached to shorter 35-foot poles without replacing them, as reflected in the JUA.[77] Moreover, it is disingenuous—Alabama Power had already decided to install 40-foot poles when the parties entered the 1978 JUA; nearly two-thirds of its joint use poles at that time were 40-foot or taller.[78] And Alabama Power concedes that it would continue to install [redacted] poles regardless of whether AT&T is attached.[79] It is mere fiction to claim that AT&T would have had to rebuild Alabama Power's network absent the JUA.[80]

It is also pure fantasy to imply that AT&T's competitors needed to replace Alabama Power's pole each time they attached.[81] Under its own theory, Alabama Power already installed taller 40-foot poles because of joint use with AT&T, and a 40-foot pole can accommodate AT&T

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companies, and CLECs have been attaching to Alabama Power's poles for decades, making use of current costs entirely inappropriate. *See, e.g.*, Reply Ex. A at ATT00311-312 (Rhinehart Reply Aff. ¶ 27); Reply Ex. E at ATT00403 (Dippon Reply Decl. ¶ 38).

[77] *See* Compl. Ex. 1 at ATT00107 (JUA, Art. VII(D)); *see also* Reply Ex. E at ATT00400 (Dippon Reply Decl. ¶ 34).

[78] Answer Ex. 2 at APC000323 (1978 App'x B, Ex. 1) (showing that 63.4% of Alabama Power's poles were 40 foot or taller in 1978); *see also* Reply Ex. E at ATT00400-401 (Dippon Reply Decl. ¶ 34).

[79] Answer Ex. D at APC000130 (Metcalfe Aff., Ex. D-2) ("Alabama Power would install [redacted] poles if it did not need to accommodate AT&T's attachments"); *see also* Reply Ex. E at ATT00401 (Dippon Reply Decl. ¶ 34).

[80] *See* Answer Ex. E at APC000227 (Arnett Decl., Ex. E-14) (stating, in 1972, that [redacted]); *see also* Reply Ex. A at ATT00311-312 (Rhinehart Reply Aff. ¶ 27); Reply Ex. C at ATT00333-334 (Peters Reply Aff. ¶ 6); Reply Ex. E at ATT00400-401 (Dippon Reply Decl. ¶ 34).

[81] *See* Answer ¶ 15 (alleging that, although "AT&T was not required to pay make-ready to access those poles in the first instance; Alabama Power's CATV and CLEC licensees were required to pay make-ready.").

and several other communications attachers.[82] Indeed, according to Alabama Power, the average pole height of its joint use and non-joint use poles is [redacted] feet,[83] and the Commission presumes that a 37.5 foot pole can accommodate Alabama Power and four additional attachers.[84] The height of Alabama Power's poles does not uniquely advantage AT&T.[85]

Second, Alabama Power claims that AT&T is competitively advantaged because it pays scheduled (*i.e.*, estimated) instead of actual make-ready costs.[86] Alabama Power again provides nothing but a hypothetical to support its claim. It reasons that "AT&T would pay between [redacted]" for some undisclosed set of pole replacements, and that AT&T's competitors "would pay between [redacted] and [redacted] … depending on whether the pole is accessible, inaccessible, single phase or three phase."[87] Alabama Power never discloses whether any of the hypothetical pole replacements were made, let alone how it calculated the costs it includes in its hypothetical—even though it elsewhere relied on a [redacted] pole replacement cost for secondary, single phase, and three phase poles.[88] Thus, the Commission should disregard Alabama Power's scheduled versus actual make-ready costs distinction.

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[82] *See* Compl. Ex. C at ATT00066 (Peters Aff. ¶ 10); Reply Ex. C at ATT000334 (Peters Reply Aff. ¶ 6).

[83] *See* Answer Ex. C at APC000079 (Morgan Decl. ¶ 11); *see also* Reply Ex. C at ATT00334 (Peters Reply Aff. ¶ 6).

[84] 47 C.F.R. §§ 1.1409(c), 1.1410; *see also Fla. Cable Telecomm. Ass'n v. Gulf Power Co.*, 26 FCC Rcd 6452, 6462 (¶ 24) (2011) (finding that a pole is not at capacity, and so does not require replacement, "[w]hen a new attacher could be accommodated by rearranging existing attachments or with conventional attachment techniques …").

[85] *See* Reply Ex. E at ATT00401 (Dippon Reply Decl. ¶ 35).

[86] *See* Answer ¶ 17.

[87] *Id.*

[88] *See* Answer Ex. D at APC000135 (Metcalfe Aff., Ex. D-3.1).

The Commission should likewise reject Alabama Power's other efforts to downplay the make-ready costs that AT&T pays.[89] Alabama Power first argues that AT&T does not have to wait for make-ready cost estimates and is guaranteed pole replacements when needed to create space on a pole.[90] But AT&T's competitors also receive timely cost estimates under the Commission's make-ready rules,[91] and Alabama Power routinely replaces poles for them.[92] Alabama Power next argues that AT&T, unlike its competitors, does not bear costs to transfer and rearrange Alabama Power's facilities. Here, Alabama Power relies on language in the JUA requiring each party to bear its own transfer and rearrangement costs.[93] But, these reciprocal terms cancel out each other and do not benefit one party more than the other even when accounting for the pole ownership disparity, as these alleged benefits exist for all jointly used poles, *i.e.*, all poles supporting facilities of both Alabama Power and AT&T that may require transfer or rearrangement.[94] Alabama Power also argues that it replaces some AT&T poles at lower cost than it thinks it could charge AT&T's competitors if they owned poles.[95] But

[89] Answer ¶¶ 15, 16.

[90] *Id.* ¶ 16.

[91] *See* 47 C.F.R. § 1.1411.

[92] *See, e.g.*, Answer ¶ 16 (relying on "pole replacement work performed for the benefit of CATVs and CLECs").

[93] *Id.* ¶ 16 (citing Answer Ex. 1 at APC000306 (JUA, Art. VI(B)) ("… each party at its own expense shall place, maintain, rearrange, transfer and remove its own attachments …").

[94] *See* Answer ¶ 13 (arguing that the "cancelling effect of reciprocal terms" must account for the number of poles impacted by the alleged advantage); *see also* Answer Ex. E at APC000241 (Arnett Decl., Ex. E-14) (stating that [redacted]); Reply Ex. C at ATT342-343 (Peters Reply Aff. ¶ 20).

[95] Answer ¶ 16.

AT&T's competitors do not own poles under their license agreements with Alabama Power, so this is a meaningless comparison.[96] AT&T is not advantaged—let alone materially advantaged—over its competitors with respect to make-ready.[97]

Third, Alabama Power makes several arguments that purport to assign to AT&T space it does not use. Specifically, it argues that AT&T is advantaged over its competitors because the JUA reserves for AT&T's "exclusive use" 2.5 feet of pole space,[98] most of which AT&T does not occupy.[99] But the JUA says the opposite—that joint use poles are adequate even if the space allocations are not observed.[100] And, Alabama Power cannot reserve "exclusive" space for AT&T anyway.[101]

Alabama Power also repeats arguments about mid-span space and safety space, but that space remains unoccupied by AT&T and its competitors.[102] Alabama Power argues alternatively

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[96] *See, e.g.*, Compl. Ex. B at ATT00050 (Miller Aff. ¶ 21); Reply Ex. C at ATT00340 (Peters Reply Aff. ¶ 16).

[97] Answer ¶¶ 15, 16.

[98] *Id.* ¶ 18.

[99] *See* Compl. Ex. B at ATT00048-49 (Miller Aff. ¶ 17); Compl. Ex. C at ATT00066 (Peters Aff. ¶ 10).

[100] *See* Compl. Ex. 1 at ATT00106 (JUA, Art. III(3)) ("… any existing joint use pole, or any pole hereafter placed in joint use, shall be deemed satisfactory … *whether or not* the space allocations made herein have been observed") (emphasis added).

[101] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination ….").

[102] Answer ¶ 18; *see also id.* ¶ 12 n.39 ("Given that the Commission has already determined that CATV and CLEC attachers should not bear this cost, this cost must fall to AT&T."); *id.* ¶ 15 (arguing that Alabama Power would not need safety space "on its poles if there are no

that AT&T should be found to occupy [redacted] feet of space because it allegedly did not attach at the absolute lowest point permissible on 8 poles.[103] According to Alabama Power, even though the JUA states that AT&T should place its facilities no lower than 19'8" above ground,[104] it should have placed them as much as 3 feet lower.[105] Alabama Power thus is again simply trying to justify charging AT&T for space it does not occupy.[106]

Fourth, Alabama Power repeats its claim that AT&T is "advantaged by virtue of paying 'per pole rates.'"[107] Not so. The Commission's rate formulas "determine the maximum just and reasonable rate *per pole*," so AT&T cannot be competitively advantaged by per-pole rates to which it is legally entitled.[108] And if Alabama Power is charging AT&T's competitors per-foot or per-attachment rates that violate the law, the solution is to correct their rates as well—not to charge AT&T more.

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communications attachments"). This argument also fails for reasons detailed above. *See* Reply, Section II.A.2.

[103] *See id.* ¶ 18; Answer Ex. E at APC000154-155, -205 (Arnett Decl. & Ex. E-9).

[104] *See* Compl. Ex. 1 at ATT00119 (JUA, App'x B, Ex. 2).

[105] *See* Answer Ex. E at APC000154-155 (Arnett Decl.) (arguing that the "pole space allocation" graphic at JUA Appendix B, Exhibit 2 should be ignored); *id.* at APC0000196-203 (Arnett Decl., Ex. E-8) (calculating lowest possible point of attachment as low 16' 6" above ground). *But see* Compl. Ex. 1 at ATT00119 (JUA, App'x B, Ex. 2).

[106] Answer Ex. E at APC0000196-203 (Arnett Decl., Ex. E-8). On 1 page of calculations, Alabama Power's witness measures two attachments—1 AT&T and 1 cable—within 1' 2" of space, but assigns 3' 6" of space to AT&T. *See id.* at APC0000196, 205 (Arnett Decl., Exs. E-8, E-9).

[107] *See* Answer ¶ 19.

[108] *Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (emphasis added); *see also id.* at 12173-74 (App'x D-1, D-2) (showing calculation of "maximum rate per pole" under cable formula). This argument also fails for reasons detailed above. *See* Reply, Section II.A.2.

Fifth, Alabama Power argues that AT&T is advantaged by its lowest position on the pole, but denies any intention to ascribe value to that position.[109] For good reason. AT&T provided ample evidence that its position increases AT&T's costs as compared to its competitors.[110] And while Alabama Power questions why AT&T did not try to negotiate a different position, Alabama Power answers its own question by admitting that AT&T's location is the result of the origin of joint use, and must generally continue so that various communications facilities do not crisscross midspan.[111]

Sixth, Alabama Power asks the Commission to ignore costs that AT&T incurs to complete its own inspections, arguing that the focus should be on "what amounts each party is required to pay Alabama Power under its contracts" and not on how "costs compare as between AT&T and Alabama Power's CATV and CLEC licensee."[112] The Commission has already rejected this argument. Alabama Power cannot "charge a higher rate" because an ILEC "performs a particular service itself and incurs costs comparable to its competitors in performing that service."[113] Doing so would "'embed in [AT&T's] rental rate costs that [Alabama Power] does not incur.'"[114]

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[109] Answer ¶ 20 ("Alabama Power does not intend to quantify this [alleged] benefit.").

[110] *See, e.g.*, Compl. ¶ 20.

[111] Answer ¶ 20; *see also* Compl. Ex. B at ATT00049 (Miller Aff. ¶ 18).

[112] Answer ¶ 21. Alabama Power falsely suggests that AT&T has not appropriately performed this work, *see, e.g.*, *id.* ¶ 13. *See* Reply Ex. B at ATT00328 (Miller Reply Aff. ¶ 20); Reply Ex. C at ATT00341-342 (Peters Reply Aff. ¶¶ 18-19); Reply Ex. D at ATT00348-382 (Little Reply Aff. ¶¶ 5-39 & Ex. D-1).

[113] *Verizon Va., LLC and Verizon S., Inc. v. Va. Electric and Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18 & n.67) (EB 2017) ("*Verizon Va.*"); *see also* Reply Ex. E at ATT00399-400 (Dippon Reply Decl. ¶ 33).

[114] *Verizon Va.*, 32 FCC Rcd at 3759 (¶ 18).

Seventh, Alabama Power claims that there is a difference between the liability-sharing provisions in the JUA and its license agreements, but does not quantify the value of the alleged difference or explain its practical application.[115] Instead, Alabama Power argues only that the "reciprocal nature" of the JUA's liability-sharing provision does not "moot" any value provided to AT&T because Alabama Power owns a greater share of the joint use poles.[116] To the contrary, there is no greater liability exposure for the party owning the most poles because, under the JUA, liability is shared on all joint use poles regardless of owner, *i.e.*, on all poles supporting facilities of both Alabama Power and AT&T.[117] Any alleged value, therefore, does "net out."[118]

Eighth, Alabama Power did not quantify any value associated with differences related to insurance and security bonds, but again argues that the parties' reciprocity on these issues does not "cancel[ ] out' the benefit to AT&T."[119] Alabama Power is again wrong. Both parties have insurance needs relating to facilities on *all* joint use poles, and so any difference related to

[115] Answer ¶ 22. Alabama Power points out a difference that *disadvantages* AT&T, specifically, that Alabama Power reads the provision to require AT&T to indemnify Alabama Power for damages where fault lies in part with Alabama Power. *See id.* (quoting Answer Ex. 1 at APC000308 (JUA, Art. XII(2)-(3)).

[116] *Id.*

[117] Compl. Ex. 1 at ATT00108 (JUA, Art. XII) ("Whenever any liability is incurred arising out of the joint use of poles under this agreement or due to the proximity of the wires, cables, strands, material, or apparatus and fixtures of the parties attached to the joint use poles covered by this Agreement, the liability for such damages, as between the parties shall be as follows …"); *see also* Reply Ex. C at ATT00343 (Peters Reply Aff. ¶ 20); Reply Ex. E at ATT00405-406 (Dippon Reply Decl. ¶ 42).

[118] *See* Answer ¶ 22 (admitting that a reciprocal provision would "net out" any value if it applies to an equal number of poles).

[119] *Id.* ¶ 23 ("Alabama Power … does not intend to quantify the economic benefit to AT&T associated with this [alleged] difference.").

insurance applies to them equally.[120] Any security bond requirement is equal as well, because Alabama Power has capped the coverage required for a security bond at an amount that would apply to both Alabama Power and AT&T.[121]

Finally, Alabama Power alleges that AT&T is advantaged because it has a "contractual right to remain attached to Alabama Power's poles" after the JUA terminates.[122] This is not a competitive advantage—Alabama Power admits that AT&T's competitors have an "extracontractual right to remain attached to Alabama Power's poles."[123] Indeed, the statutory right of access post-termination that AT&T's competitors enjoy is *more valuable* than AT&T's contractual right.[124] For if Alabama Power terminates a license agreement, AT&T's competitor still has a federally protected right to deploy on new Alabama Power pole lines.[125] If Alabama

[120] Reply Ex. C at ATT00343 (Peters Reply Aff. ¶ 20); Reply Ex. E at ATT00405-406 (Dippon Reply Decl. ¶ 42).

[121] Compl. Ex. 2 at ATT00153 (CLEC License at Ex. D) and Compl. Ex. 3 at ATT00191 (Cable License at Ex. D) (stating that surety bond coverage is calculated as $25/attachment for more than 25,000 attachments, up to a maximum of $2.5 million (*i.e.*, 100,000 attachments); Compl. Ex. 5 at ATT00196 (2018 Invoice) (showing each party has more than 100,000 attachments); Reply Ex. C at ATT00343 (Peters Reply Aff. ¶ 20); Reply Ex. E at ATT00405-406 (Dippon Reply Decl. ¶ 42).

[122] Answer, Executive Summary.

[123] Answer ¶ 14 n.52.

[124] *See* Answer Ex. D at APC000093-94 (Metcalfe Aff. ¶ 9) ("Alabama Power is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, which is an ILEC.… This represents a fundamental difference between CLECs or CATVs as compared to ILECs. Without a contractual obligation for a utility to provide access, … ILECs are at a material disadvantage compared to CLECs and CATVs."); *see also* Reply Ex. A at ATT00311 (Rhinehart Reply Aff. ¶ 26); Reply Ex. C at ATT00339 (Peters Reply Aff. ¶ 15); Reply Ex. E at ATT00397-398 (Dippon Reply Decl. ¶ 29).

[125] 47 U.S.C. § 224(f).

Power terminates the JUA, AT&T will have no right of access and will need to identify, fund, and deploy alternate infrastructure going forward.[126]

Alabama Power's attempt to rebut the Commission's new telecom rate presumption is flawed for other reasons as well. It does not account for aspects of the JUA that *disadvantage* AT&T as compared to its competitors, even though Alabama Power admits that the JUA, "in contrast to Alabama Power's CATV and CLEC pole license agreements," requires AT&T to incur "substantial and growing" pole ownership and maintenance costs.[127] And Alabama Power admits that, even if it could rebut the presumption, the JUA rates are *higher* than the maximum rates permitted.[128] There is thus no lawful basis for the rates that Alabama Power charges AT&T. The Commission should enforce its presumption and set the new telecom rate as the just and reasonable rate for AT&T's use of the presumptive 1 foot of space on Alabama Power's poles.

B. Even Apart from the 2018 *Third Report and Order*, Alabama Power Could Not Lawfully Charge The JUA Rates Back To 2011.

Because the new telecom rate presumption applies in this case, and Alabama Power has not rebutted it with clear and convincing evidence, the Commission does not need to consider

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[126] *See, e.g.*, Answer ¶ 14 n.52 ("AT&T has no right of access under the law. AT&T either obtains this right through contract, or they don't have it at all."). Contrary to its position in this matter, the higher value that Alabama Power truly places on the statutory right of access under Section 224 is evident in its prior attempts to increase rental rates when access became mandatory versus via contract. *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1365 (11th Cir. 2002) (rejecting Alabama Power's attempt to increase its cable rate from $7.47 to $38.81 per pole to reflect the higher value of mandatory statutory access).

[127] *See* Answer ¶ 39.

[128] *See id.* ¶ 26 (admitting that AT&T has been paying rates "higher than the pre-existing telecom rate"). For this comparison, Alabama Power even uses rates that are far higher than properly-calculated pre-existing telecom rates, because it improperly departs from the Commission's presumptive inputs without sufficient data to support that divergence. *See* Reply, Section II.C.1; Reply Ex. A at ATT00306 (Rhinehart Reply Aff. ¶ 16).

whether rate relief is *also* justified under the standard adopted in its 2011 *Pole Attachment Order*. The just and reasonable rate is the new telecom rate.[129] Alabama Power nonetheless takes issue with AT&T's argument that, even without the rate presumption, AT&T has been entitled to a just and reasonable new telecom rate since the July 12, 2011 effective date of the *Pole Attachment Order*.[130] Its arguments, which largely duplicate arguments made in its unsuccessful attempt to rebut the presumption, are rife with error and should be rejected.

First, Alabama Power argues that the JUA rates are "just and reasonable" because they were agreed upon.[131] But the Commission has previously found that "pole attachment rates cannot be held reasonable simply because they have been agreed to."[132] Alabama Power also questions why AT&T did not challenge the rates immediately after the 2011 *Pole Attachment Order* was released.[133] AT&T did not have to immediately challenge the rates. "[T]he Commission declined to impose time limits on the filing of pole attachment complaints," so it

[129] 47 C.F.R. § 1.1413(b).

[130] Answer ¶¶ 27-39. Alabama Power suggests that the Commission, in the 2018 *Third Report and Order*, created some "temporal categor[y]" of old agreements that escape the Commission review that was extended to them in the 2011 *Pole Attachment Order*. *See id.* ¶ 25. Not so. The FCC does not "depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). It must at least "display awareness that it *is* changing position" and "must show that there are good reasons for the new policy." *Id.* (emphasis in original). The Commission certainly showed no such intention here. To the contrary, the Commission took the next step forward to eliminate the outdated rate disparities that persisted despite the 2011 *Order*. See *Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123).

[131] Answer ¶ 28.

[132] *Selkirk Commc'ns, Inc. v. Fla. Power & Light Co.*, 8 FCC Rcd 387, 389 (¶ 17) (1993).

[133] Answer ¶ 128.

was eminently reasonable for AT&T to provide the Enforcement Bureau an opportunity to first resolve other ILEC rate disputes under the new 2011 standard.[134]

Alabama Power also claims that the rates are reasonable because the JUA rate formula divides 100% of the pole cost between AT&T and Alabama Power.[135] But this, in fact, makes the JUA rate formula particularly *unjust and unreasonable*. Even Alabama Power admits that "third-party attachers [are] conspicuously absent" from this cost allocation since "both parties had 10's of thousands of third-party attachments on their poles" when it took effect in the 1990s.[136] Their omission is even more unreasonable today; Alabama Power has more than [redacted] CLEC and cable companies attachments on its poles, and yet has never reduced AT&T's share of the pole costs.[137] Alabama Power, as a result, continues to collect [redacted] of its pole cost from AT&T while collecting additional rent from AT&T's competitors, even though Alabama Power requires far more space on the pole than all the communications attachers combined.[138] The JUA rates are unjust and unreasonable.[139]

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[134] *Verizon Va.*, 32 FCC Rcd at 3763 (¶ 28); Compl. Ex. 7 at ATT00207 (Letter from K. Hitchcock, AT&T, to D. Bynum, Alabama Power (Mar. 7, 2018)) (requesting rate negotiations, and relying on "the FCC's 2011 *Pole Attachment Order* and the 2017 Order in the *Verizon v. Dominion* case"); *see also* Pet. Br. at 40, *Southern Co. Servs., Inc. v. FCC*, 2002 WL 34246009 (D.C. Cir. 2002) (emphasis added) (admitting that "attaching entities can *always* seek Commission revision of a term" in a pole attachment agreement").

[135] Answer ¶ 29.

[136] Answer Ex. E at APC000154 (Arnett Decl.).

[137] *See* Reply Ex. A at ATT00315-316 (Rhinehart Reply Aff. ¶ 34); *see also* Reply Ex E at ATT00390, -407, -409, -411 (Dippon Reply Decl. ¶¶ 12, 44, 50, 53).

[138] Compl. ¶ 29 n.77; *see also* Compl. Ex. D at ATT00079-81 (Dippon Aff. ¶ 24-27); *see also Verizon Va*., 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)) (stating that the Commission expected that ILECs and electric utilities would pay "roughly the same proportionate rate given the parties' relative usage of the pole").

[139] *See* Compl. Ex. D at ATT00070 (Dippon Aff. ¶ 5); Reply Ex. E at ATT00385, -414 (Dippon Reply Decl. ¶¶ 3, 57).

Second, Alabama Power argues that "the notion that relative pole ownership affects the ability to negotiate is not merely incorrect—it is foundational error."[140] The Commission concluded otherwise. In 2011, it explained that because "electric utilities appear to own approximately 65-70 percent of poles," "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates" for ILECs.[141] In 2017, the Enforcement Bureau confirmed that an electric utility's relatively high rates coupled with its "nearly two-to-one pole ownership advantage" supported an inference of bargaining leverage that justified rate relief for the ILEC.[142] And in 2018, the Commission again found that a decline in ILEC pole ownership necessitated further action to ensure just and reasonable rates for ILECs.[143]

Alabama Power also argues that its pole ownership advantage should be ignored because it unearthed an old Bell System Practice from the 1970s stating that [redacted]

[140] Answer ¶ 30.

[141] *Pole Attachment Order*, 26 FCC Rcd at 5327, 5329 (¶¶ 199, 206); *see also* Reply Ex. E at ATT00394-396 (Dippon Reply Decl. ¶¶ 22-26).

[142] *Verizon Va.*, 32 FCC Rcd at 3757 (¶ 13).

[143] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

[144] Answer ¶ 30 (quoting Answer Ex. E at APC000243 (Arnett Decl., Ex. E-14)).

[145] *See* Reply Ex. A at ATT00315-316 (Rhinehart Reply Aff. ¶¶ 33-34); Reply Ex. E at ATT00409, -411 (Dippon Reply Decl. ¶¶ 50, 53).

[redacted][147] The old document thus evidences a resignation to unjust and unreasonable rates—and not an endorsement of them.[148]

Third, Alabama Power claims that AT&T does not "genuinely lack the ability to terminate" the contract rates because it can remove its facilities from 630,000 Alabama Power poles.[149] This argument is a microcosm of Alabama Power's position—pay extraordinarily high pole attachment rates under the JUA or get off Alabama Power's poles. Thankfully, that is not required by Commission rules. Instead, "where incumbent LECs have … access" to an electric utility's poles, "they are entitled to rates … that are 'just and reasonable.'"[150] They need not disrupt their network or rebuild a duplicative one in order to obtain the just and reasonable rates required by law.[151] The Enforcement Bureau thus previously relied on an evergreen clause that, like the clause in the JUA, requires payment of the JUA rates after termination as evidence that

[146] Answer Ex. E at APC000229-32 (Arnett Decl., Ex. E-14).

[147] *Id.* at APC000229 (Arnett Decl., Ex. E-14). The Practice explained that [redacted]

[148] *See* Reply Ex. E at ATT00410-411 (Dippon Reply Decl. ¶¶ 52-53).

[149] Answer ¶ 31 ("If AT&T were to remove its facilities from some or all of Alabama Power's poles, it would no longer be bound to [pay the JUA rates]."); s*ee also id.* ¶ 35 ("AT&T can terminate by simply removing its facilities.").

[150] *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

[151] *See, e.g.*, Reply Ex. E at ATT00387, -390 (Dippon Reply Decl. ¶¶ 8, 12).

rate relief was justified because the ILEC "genuinely lacks the ability to terminate an existing agreement."[152]

Alabama Power also argues that AT&T has not shown that it cannot obtain new just and reasonable rates for the JUA through negotiations.[153] Its conduct and arguments prove the opposite. For about eleven pages of its Answer, Alabama Power take great umbrage that AT&T sought a just and reasonable rate "with no changes whatsoever to the joint use agreement."[154] But AT&T is entitled to a just and reasonable rate under the JUA; no changes are required.[155] Alabama Power thus confirms that further negotiations for a just and reasonable rate were futile: Alabama Power "made [it] **abundantly clear** to AT&T … that Alabama Power would not be offering AT&T the new telecom rate for existing joint use poles," and that it "would **never** … negotiate[ ] an agreement like [the JUA] if the most it could recover was the one-foot CATV or telecom rate (old or new)."[156]

Finally, Alabama Power argues that AT&T can never be "similarly situated" to its competitors because of two "irreversible" characteristics: it owns poles and it is the incumbent

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[152] *See Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, 30 FCC Rcd 1140, 1150 (¶ 25) (EB 2015) ("Verizon Fla.") (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)). Alabama Power takes issue with AT&T's description of the evergreen clause in the JUA, Answer ¶ 31, but it is materially *identical* to the evergreen clause in the *Verizon Florida* case. *See* Compl. Ex. 1 at ATT00108-109 (JUA, Art. XV) (the "Agreement shall, so long as such [existing] attachments are continued, remain in full force and effect…"); *Verizon Fla.*, 30 FCC Rcd at 1144 (¶ 12) (the "Agreement shall remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties herein with respect to existing joint use poles.").

[153] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216); *see also* Answer ¶¶ 31-35.

[154] Answer ¶ 35; *see also id.* ¶¶ 31-35.

[155] *See Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.479) (rejecting argument from Southern Company "that we should not apply the presumption to existing agreements").

[156] Answer ¶¶ 25, 35 (emphases in original).

provider.[157] The Commission has rejected these arguments time and again, finding in 2011 that ILECs *can be* "comparably situated to telecommunications carriers or cable operators," and presuming in 2018 that they *are* "similarly situated to other telecommunications attachers."[158] AT&T should be paying the new telecom rate.[159]

C. Alabama Power's Attempts To Delay Rate Relief Are Meritless.

Alabama Power's remaining arguments seek to delay the effectiveness of the Commission's rulings, either by eliminating refunds, staying the proceeding, or abandoning the Commission's ILEC rate reforms. Instead, the Commission should expedite the rental rate relief that it found essential to the Commission's competition and broadband deployment goals.

1. AT&T Should Be Awarded A Properly Calculated Per-Pole New Telecom Rate Effective As Of The 2012 Rental Year.

Because Alabama Power has not identified any material advantages that AT&T enjoys over its competitors, AT&T should be charged a properly calculated new telecom "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)."[160] These applicable new telecom rates for AT&T's use of Alabama Power's poles during the 2011 through 2017 rental years are $8.10, $7.80, $7.66, $7.84, $7.53, $7.58, and $8.35 per pole, respectively.[161]

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[157] *Id.* ¶¶ 37-39.

[158] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217).

[159] *See* Compl. Ex. D at ATT00070 (Dippon Aff. ¶ 5); Reply Ex. E at ATT00385, -414 (Dippon Reply Decl. ¶¶ 3, 57).

[160] 47 C.F.R. § 1.1413(b).

[161] Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 13); Reply Ex. A at ATT00297-300 (Rhinehart Reply Aff. ¶¶ 3, 7).

Alabama Power argues that different rates apply, but its rates were not calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)" as required.[162] Alabama Power effectively admits that it overcharged its CLEC attachers for the 2011 through 2014 rental years by ignoring the [redacted] that took effect in June 2011.[163] It also admits that it has made "modifications" to the new telecom formula, "including but not limited to" the use of "investment in overhead grounds (booked in FERC Account 365)" in its annual pole cost calculation.[164] Alabama Power argues that the modifications resulted from "a lengthy negotiation between Alabama Power and the Alabama Cable Telecommunications Association."[165] But that does not make them lawful.[166] To the contrary, Alabama Power's pole attachment rate calculations appear to be patently unlawful.[167]

Alabama Power also asks to apply the Commission's rate formulas differently when AT&T is the attaching entity. When calculating rates for AT&T's competitors, Alabama Power

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[162] 47 C.F.R. § 1.1413(b); *see also* Reply Ex. A at ATT00300-304 (Rhinehart Reply Aff. ¶¶ 8-13).

[163] *See* Answer Ex. B at APC000059, -62-65 (Conwell Decl. ¶ 10, Ex. B-1) (omitting [redacted] 2011 through 2014 rate calculations). *But see Pole Attachment Order*, 26 FCC Rcd at 5305 (¶ 149); Final Rule, *A National Broadband Plan for Our Future*, 76 Fed. Reg. 26620-02 (May 9, 2011) (announcing June 8, 2011 effective date for new telecom rate formula).

[164] *See* Compl. Ex. 2 at ATT00148 (CLEC License, Ex. A); Answer ¶ 41. Alabama Power argues that it should not be bound by the Commission's decision not "to add portions of Account[ ] 365" to the pole cost calculation. *Id.*; *see In re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6475 (¶ 38) (2000). But Alabama Power previously acknowledged that Account 365 is "omitted from the Commission's rate." Aff. of R.E. Prater ¶ 2, attached to Petition for Reconsideration, *In re Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98 (2000).

[165] Answer ¶ 41.

[166] *See, e.g.*, *Consolidated Partial Order*, 16 FCC Rcd at 12112-13 (¶¶ 12-14) (rejecting request "to declare negotiated agreements for pole attachments inviolate").

[167] Reply Ex. A at ATT00300-304 (Rhinehart Reply Aff. ¶¶ 8-13).

uses the Commission's presumptive inputs for space occupied (1 foot) and average number of attaching entities (5 for an urbanized area).[168] But when calculating rates for AT&T, Alabama Power uses *different* inputs for space occupied ([redacted] feet), as discussed above, and average number of attaching entities ([redacted]).[169] Alabama Power did not rebut the use of the Commission's presumptions for any of its attachers.[170] AT&T should pay new telecom rates that, like the rates Alabama Power charges AT&T's competitors, use the FCC's presumptive inputs, including for pole space occupied and number of attachers.[171]

[168] *See* Answer Ex. B at APC000062-69 (Conwell Decl., Ex. B-1).

[169] Answer ¶¶ 12, 26, 40, 47, 48; Answer Ex. B at APC000059 (Conwell Decl. ¶ 13). Alabama Power claims that it has rounded up to [redacted] from an average of [redacted] attaching entities acquired from "mapping data" it did not provide. *See* Answer Ex. C at APC000078 (Morgan Decl. ¶ 10). It is noteworthy that Alabama Power does not rely on this same "mapping data" for any other purpose, including to calculate rates for AT&T's competitors. *See* Compl. Ex. 19 at ATT00285 (Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 27, 2019)). Because Alabama Power does not consider its "mapping data" sufficiently reliable to use when calculating rates for AT&T's competitors, it cannot be sufficiently reliable to use to increase the rates it charges AT&T. *See, e.g.*, Reply Ex. C at ATT00335-336 (Peters Reply Aff. ¶ 8); *see also* Reply Ex. A at ATT00306 (Rhinehart Reply Aff. ¶ 16).

[170] *Teleport Commc'ns Atlanta, Inc*., 17 FCC Rcd at 19869 (¶ 25) (requiring "statistically valid survey" data that "reflect[s] *only* those poles in areas where [the attacher] is actually affixed") (emphasis added); *see also id.* at 19866 (¶ 18) (stating that the "survey should be submitted"); Reply Ex. A at ATT00303-306 (Rhinehart Reply Aff. ¶¶ 13, 16).

[171] *See* Compl. Ex. 19 at ATT00285 (Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 27, 2019)) (Alabama Power does "not currently rebut [the FCC] presumptions with respect to CATV and CLEC attachers").

These new just and reasonable rates should take effect as of the 2012 rental year. Alabama Power does not challenge the Commission's authority to award refunds, but argues that a shorter refund period should apply.[172] It should not.[173]

First, Alabama Power asks the Commission to ignore the 6-year statute of limitations that applies to actions involving an Alabama contract[174] and instead apply the 2-year statute of limitations under 47 U.S.C. § 415, which bears no relation to this dispute. Section 415 applies only to a carrier action to recover *lawful* charges and to an action against a carrier to recover damages and overcharges. This dispute is neither.[175] Alabama Power does not otherwise explain why the 2-year statute of limitations under Section 415 is "applicable" to a refund of unjust and unreasonable pole attachment rentals.[176]

Rather, the Commission has explained that disputes involving the rates, terms, and conditions of pole attachment agreements would be treated consistently "with the way that claims for monetary recovery are generally treated under the law."[177] This followed a long line

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[172] Alabama Power correctly acknowledges that, although the Commission declined to create a "right to refunds," it did not eliminate its authority to award refunds when appropriate. *See* Answer ¶ 42.

[173] Alabama Power fails to note that a refund would negate one of its complaints—specifically, that it paid JUA rates from 2015-2017 that were higher than the AT&T's annual pole cost as calculated under the FCC's rate formula. *See* Answer ¶¶ 26, 35, 43. AT&T has asked for a *net* refund calculated by applying properly calculated and proportional FCC rates to AT&T's use of Alabama Power's poles *and* to Alabama Power's use of AT&T's poles. *See* Compl. ¶ 47; Compl. Ex. A at ATT00037 (Rhinehart Aff., Ex. R-3).

[174] *See* Ala. Code § 6-2-34(9) (applying to "[a]ctions upon any simple contract.").

[175] *See* Answer ¶ 42 (relying on 47 U.S.C. § 415) (emphasis added).

[176] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112); 47 C.F.R. § 1.1407(a)(3).

[177] *See Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); *see also In the Matter of Implementation of Section 224 of the Act; A Nat'l Broadband Plan for Our Future*, 25 FCC Rcd 11864, 11902 (¶ 88) (2010) ("Generally speaking, a plaintiff is entitled to recompense going

of precedent that "where there is no statute of limitations expressly applicable to a federal statute, …. 'the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim.'"[178] As a result, where, as here, the federal claim involves a contract, "contract law provides the best analogy" and the court should "adopt the general contract law statute of limitations."[179] The Enforcement Bureau previously cited an agreement among parties to a similar dispute that a five-year statute of limitations for actions involving a Virginia contract was applicable.[180] The comparable statute of limitations in Alabama is 6 years.[181]

Second, Alabama Power asks to limit refunds to the period following AT&T's March 2018 request for rate negotiations.[182] The Commission, however, has "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[183] Doing so "runs counter to the very idea of a statute of limitations."[184]

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back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently.").

[178] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (quoting *Cty. of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240 (1985)). *See also Spiegler v. District of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989) ("When Congress has not established a statute of limitations for a federal cause of action, it is well-settled that federal courts may 'borrow' one from an analogous state cause of action, provided that the state limitations period is not inconsistent with underlying federal policies.").

[179] *Id.* Moreover, the Commission could have, but did not, specify a one-size-fits-all federal statute of limitations, further reinforcing that the "applicable statute of limitations" is drawn from state law.

[180] *See Verizon Va.*, 32 FCC Rcd at 3764 (¶ 28 n.104) (citing Va. Code § 8.01-246(2)).

[181] *See* Ala. Code § 6-2-34(9).

[182] Answer ¶ 42.

[183] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[184] *See id.*

Third, Alabama Power argues that a refund award should not include years before the *Third Report and Order* took effect because, had AT&T then sought relief, it would have had the burden to prove the rates were "unjust and reasonable."[185] But AT&T *has* satisfied that burden. It presented far more than a *prima facie* case that the JUA rates are unjust and unreasonable—it provided lengthy factual, legal, and economic evidence that "even apart from the 2018 *Third Report and Order*, AT&T was entitled to just and reasonable rates back to 2011."[186] The burden is thus on Alabama Power to justify its rates for all time periods in dispute.[187] That it has not done.[188]

2. There Is No Basis For Staying, Forbearing, Or Otherwise Delaying The Resolution Of This Dispute.

Finally, the Commission should reject Alabama Power's various requests to stay, forebear, or otherwise postpone the resolution of this dispute. *First,* Alabama Power argues that the Commission should find that AT&T has not yet complied with its obligation to "in good

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[185] Answer ¶ 42.

[186] *See* Compl. Section III.C; *see also Cable Television Ass'n of Ga. v. Ga. Power Co*., 18 FCC Rcd 16333, 16337 (¶ 8) (2003) (finding burden to make a *prima facie* showing satisfied where complaint "could have been more detailed," but "identifie[d] the factual basis of the allegations"); *Selkirk Commc'ns*, 8 FCC Rcd at 389 (¶ 17) (finding burden to make a *prima facie* showing satisfied where complaint alleged that attacher was "required to pay a rate … that is higher than the regulated rate").

[187] *Verizon Va.*, 32 FCC Rcd at 3759 (¶ 19 n.70) ("Once a *prima facie* showing has been made by the complaint, the Commission's pole attachment complaint rules require the respondent to 'set forth justification for the rate, term or condition alleged in the complaint not to be just and reasonable.'") (quoting 47 CFR § 1.1407(a) (2018)); *see also Marcus Cable Assocs. v. Tex. Utils. Elec. Co*., 18 FCC Rcd 15932, 15938-39 (¶ 13) (2003) ("Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the respondent bears a burden to explain or defend its actions.").

[188] *See, e.g.*, Reply Ex. B at ATT00329 (Miller Reply Aff. ¶ 22); Reply Ex. C at ATT00334 (Peters Reply Aff. ¶ 21); Reply Ex. E at ATT00385-386, -413-414 (Dippon Reply Decl. ¶¶ 3, 57).

faith, discuss[ ] or attempt[ ] to discuss the possibility of settlement" before filing a complaint.[189] But the facts show otherwise.[190] Alabama Power does not (and cannot) dispute that AT&T did *discuss* the possibility of settlement before filing because AT&T engaged in extensive correspondence with Alabama Power regarding the substance of its allegations,[191] traveled to Alabama Power's headquarters not once but on two occasions to try to settle this dispute,[192] and provided a settlement offer that reflected far more movement on AT&T's part than on Alabama Power's.[193] Alabama Power instead claims that AT&T did not engage in those discussions "in good faith" because "AT&T merely insisted at all times on retaining the benefits of the joint use agreement, but at the per pole rate a CLEC would pay for one-foot of occupancy."[194] Alabama Power's accusations thus boil down to its disagreement with the Commission's Orders.[195]

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[189] 47 C.F.R. § 1.722(g); *see also* Answer ¶¶ 4, 7, 14, 32-35.

[190] Compl. Ex. A at ATT00003-04 (Rhinehart Aff. ¶ 4); Compl. Ex. B at ATT00044-47 (Miller Aff. ¶ 12); Reply Ex. A at ATT00307-310 (Rhinehart Reply Aff. ¶¶ 18-23); Reply Ex. B at ATT00319-325 (Miller Reply Aff. ¶¶ 2-13); Reply Ex. C at ATT00332-333 (Peters Reply Aff. ¶¶ 3-4).

[191] *See, e.g.*, Compl. Ex. 7 at ATT00207-208 ((Letter from K. Hitchcock, AT&T, to D. Bynum, Alabama Power (Mar. 7, 2018)); Compl. Ex. 12 at ATT00255-256 (Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (June 26, 2018)); Compl. Ex. 14 at ATT00264-266 (Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (Aug. 16, 2018)); Compl. Ex. 16 at ATT00271-272 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 8, 2019)); Compl. Ex. 18 at ATT00282-283 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 25, 2019)).

[192] *See* Compl. Ex. A at ATT00003-4 (Rhinehart Aff. ¶ 4); Compl. Ex. B at ATT00045-47 (Miller Aff. ¶¶ 10-13).

[193] Alabama Power inappropriately and repeatedly relied on inadmissible material protected by Federal Rule of Evidence 408. *See* Answer ¶¶ 7, 14, 35; Answer Ex. 24 at APC000524-25; Answer Ex. 25 at APC000527-528. The material should not be considered in resolving this dispute. But if it is, the material confirms AT&T's good faith efforts to settle this dispute. Answer Ex. 25 at APC000527; *see also* Reply Ex. B at ATT00324 (Miller Reply Aff. ¶ 11).

[194] Answer, Executive Summary.

[195] *See, e.g.*, Answer ¶¶ 7, 31-35. Alabama Power's allegations of "bad faith" are also flatly wrong. *See* Reply Ex. A at ATT00307-310 (Rhinehart Reply Aff. ¶¶ 18-23); Reply Ex. B at

AT&T's confidence in the merits of its own position that it is entitled to the same new telecom rate that applies to its competitors is not evidence of "bad faith." In both 2011 and 2018, the Commission recognized that AT&T has a statutory right to "just and reasonable" rates that applies to the JUA.[196] That Alabama Power still refuses to recognize that right explains why AT&T's extensive executive-level discussions—conducted in good faith—could not succeed.[197]

Second, in a footnote, Alabama Power asks the Commission to wait until an arbitrator first considers this rate dispute.[198] The only explanation Alabama Power offers is its claim that the parties must arbitrate disputes about the "intent of the Agreement" or disputes "not covered by [its] terms."[199] But this is neither. It is a dispute about the meaning and application of the statutory "just and reasonable" rate requirement to the JUA and its rate provision. Indeed, the statutory right did not exist when the JUA was entered, and so could not have been within the drafters' intent.[200] And it cannot be the case that Alabama Power's obligation to abide by the 2011 and 2018 *Orders* (or, for that matter, any of the Commission's other pole attachment rules) is "not covered by its terms" and thus, a matter for arbitration, simply because those *Orders* post-dated the JUA. Indeed, the whole purpose of the Commission's 2011 and 2018 *Orders* was to provide a mechanism for timely addressing and eliminating unjust and unreasonable rates in

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ATT00319-325 (Miller Reply Aff. ¶¶ 2-13); Reply Ex. C at ATT00332-333 (Peters Reply Aff. ¶¶ 3-4).

[196] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127).

[197] *See* Answer ¶ 45 & Affirmative Defense 7; *see also* Reply Ex. A at ATT00308 (Rhinehart Reply Aff. ¶ 20); Reply Ex. B at ATT00319 (Miller Reply Aff. ¶ 2).

[198] Answer ¶ 4 n.8.

[199] *Id.*

[200] *See, e.g.*, *Koullas v. Ramsey*, 683 So. 2d 415, 417 (Ala. 1996) ("[T]his Court will not stretch the language of [an arbitration provision] to apply to matters that were not contemplated by the parties when they entered the contract.").

agreements like the JUA. There is, therefore, no basis to stay AT&T's complaint pending arbitration because the parties did not agree to arbitrate this dispute.[201]

Finally, Alabama Power asks the Commission to forbear, waive, or suspend any regulation that recognizes AT&T's right to just and reasonable rates.[202] But Alabama Power provides no justification or support for this remarkable request. Enforcement is required and proper, because the Commission found that "just and reasonable" rates for ILECs "will promote broadband deployment and serve the public interest [as] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment."[203] The Commission should promptly enforce its order, set the new telecom rate as the just and reasonable rate for AT&T's use of Alabama Power's poles, and refund the amounts Alabama Power has unlawfully demanded.

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[201] *See Larsen v. Citibank FSB*, 871 F.3d 1295, 1302 (11th Cir. 2017) (Parties cannot be compelled "to arbitrate their dispute in the absence of clear agreement to do so."). Even if the dispute was covered by the arbitration clause, it would only delay the Commission's decision. The statute gives the Commission the duty to "hear and resolve complaints concerning [pole attachment] rates," 47 U.S.C. § 224(b)(1), and so it "may not subdelegate [that duty] to outside entities—private or sovereign," *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). The ultimate decision must be the Commission's. *Id.* at 568 ("An agency may not … merely 'rubber-stamp' decisions made by others").

[202] Answer ¶¶ 10, 45.

[203] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126). Forbearance is precluded by statute because enforcement of the Commission's regulations *is* (1) "necessary to ensure that the … regulations … in connection with … telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "necessary for the protection of consumers," and (3) "consistent with the public interest." 47 U.S.C. § 160(a). For the same reasons, there is no "good cause" to waive the Commission's enforcement of AT&T's right to just and reasonable rates. *See* 47 C.F.R. § 1.3.

III. DENIAL OF ALABAMA POWER'S AFFIRMATIVE DEFENSES

AT&T specifically denies each Affirmative Defense asserted by Alabama Power, and incorporates its Pole Attachment Complaint, this Pole Attachment Complaint Reply, and all Affidavits, Declaration, and Exhibits filed by AT&T in support of each, as if fully set forth in denial of Alabama Power's Affirmative Defenses. In addition:

1. AT&T denies that it "is estopped from seeking a refund for periods that precede March 7, 2018," the date that AT&T asked Alabama Power to negotiate a just and reasonable rate.[204] The Commission "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge" because it would "run[ ] counter to the very idea of a statute of limitations."[205]

2. AT&T denies that its "complaint should be dismissed for failure to comply with the good-faith negotiation requirement set forth in Rule 1.722(g)."[206] Prior to filing its complaint, AT&T notified Alabama Power in writing of the allegations that form the basis of its complaint and invited a response within a reasonable time period.[207] AT&T also, in good faith,

[204] Answer, Affirmative Defense 1.

[205] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[206] Answer, Affirmative Defense 2.

[207] *See, e.g.*, Compl. Ex. 7 at ATT00207-208 ((Letter from K. Hitchcock, AT&T, to D. Bynum, Alabama Power (Mar. 7, 2018)); Compl. Ex. 12 at ATT00255-256 (Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (June 26, 2018)); Compl. Ex. 14 at ATT00264-266 (Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (Aug. 16, 2018)); Compl. Ex. 16 at ATT00271-272 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 8, 2019)); Compl. Ex. 18 at ATT00282-283 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 25, 2019)).

engaged in two face-to-face executive-level meetings and numerous other discussions with Alabama Power concerning the possibility of settlement, and exchanged a settlement offer.[208]

3. AT&T denies that its claim "fails to state a claim upon which relief can be granted" under 47 C.F.R. § 1.1413(b) because the JUA "was not 'entered into or renewed' after the effective date of the rule."[209] The new telecom rate presumption codified at 47 C.F.R. § 1.1413(b) applies to "new and newly-renewed joint use agreements," including agreements "that are automatically renewed, extended, or placed in evergreen status."[210] The JUA's initial term expired on June 1, 1988, and it "*shall continue* thereafter until terminated … by either party giving to the other party one (1) year's notice in writing…."[211] Continue and extend are synonyms, meaning that the JUA has "automatically … extended" after the effective date of the new rule. The new telecom rate presumption applies.[212]

4. AT&T denies that this dispute is covered by a mandatory arbitration provision.[213] This dispute is about the meaning and application of the statutory "just and reasonable" rate requirement to the JUA. It is not a dispute about the "intent of the Agreement," because the statute did not exist when the JUA took effect in 1978. It also cannot be the case that Alabama Power's obligation to abide by the 2011 and 2018 *Orders* (and, for that matter, any of the

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[208] *See* Compl. Ex. A at ATT00003-4 (Rhinehart Aff. ¶ 4); Compl. Ex. B at ATT00045-47 (Miller Aff. ¶¶ 10-13); Compl. Ex. C at ATT00063 (Peters Aff. ¶ 2); Reply Ex. A at ATT00307-301 (Rhinehart Reply Aff. ¶¶ 18-23); Compl. Ex. B at ATT00319-325 (Miller Reply Aff. ¶¶ 2-13); Compl. Ex. C at ATT00332-333 (Peters Reply Aff. ¶¶ 3-4).

[209] Answer, Affirmative Defense 3.

[210] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475).

[211] Compl. Ex. 1 at ATT00108 (JUA, Art. XV).

[212] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475).

[213] Answer, Affirmative Defense 4.

Commission's other pole attachment rules) is "not covered by its terms" and thus, a matter for arbitration, simply because those *Orders* post-dated the JUA. These are the two sole bases for arbitration under the arbitration provision, as Alabama Power concedes.[214] In any event, a dispute over whether Alabama Power must comport with Commission rules may not be reserved for arbitration, which would only delay resolution of this dispute contrary to Commission intent.

5. AT&T denies that "[t]he Commission should forbear from exercising jurisdiction in this case because the facts and circumstances that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not present in this case."[215] This case presents *worse* facts: AT&T has been paying rates under the JUA that are nearly [redacted] the average $26.12 per-pole rate that, in part, led the Commission to adopt the new telecom rate presumption in order to accelerate rate relief to ILECs.[216] Also, Alabama Power has not filed a proper forbearance request, and the Commission cannot forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[217] In any event, forbearance is precluded by statute because enforcement of AT&T's right to just and reasonable rates *is* (1) "necessary to ensure that the … regulations … in connection with … telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "necessary for the protection of consumers," and (3) "consistent with the public interest."[218]

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[214] Answer ¶ 4 n.8 (quoting Answer Ex. 1 at APC000309 (JUA, Art. XVIII)).

[215] Answer, Affirmative Defense 5.

[216] *See Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125).

[217] *See* 47 C.F.R. §§ 1.53-1.59.

[218] *See* 47 U.S.C. § 160(a); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (finding "just and reasonable" rates for ILECs "will promote broadband deployment and serve

6. AT&T denies that the Commission should waive the applicability of its rules as they apply to ILECs under 47 C.F.R. § 1.3.[219] There is no "good cause" (and can be no "good cause") to support a waiver of the Commission's statutory duty to "hear and resolve complaints concerning [ILEC pole attachment] rates" to ensure "that such rates [charged ILECs] … are just and reasonable."[220] To the contrary, such a waiver would directly contravene the Commission's goals of promoting broadband investment.

7. AT&T denies that "[t]he rule upon which AT&T's complaint is premised is unlawful, ultra vires, arbitrary, capricious and unreasonable."[221] The Commission's 2011 decision that ILECs, including AT&T, are "providers of telecommunications service," are statutorily entitled to just and reasonable pole attachment rates, and should pay "the same rate as [a] comparable provider" when they attach to an electric utility's poles pursuant to comparable terms and conditions," was lawful, reasonable, correct, within its authority, and affirmed on appeal.[222] The Commission's adoption of the new telecom rate presumption was also lawful, reasonable, correct, and within its authority, and is effective pending appeal.[223]

8. AT&T denies that "[t]he applicable statute of limitations bars some or all of AT&T's claim."[224] The applicable statute of limitations is 6 years because this action involves

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the public interest [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment").

[219] Answer, Affirmative Defense 6.

[220] 47 U.S.C. § 224(b)(1).

[221] Answer, Affirmative Defense 7.

[222] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217), *aff'd Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 18 (2013).

[223] Final Rule, 84 Fed. Reg. 2460-01 (Feb. 7, 2019).

[224] Answer, Affirmative Defense 8.

an Alabama contract, and the Commission decided to treat disputes involving the rates, terms, and conditions of pole attachment agreements consistently "with the way that claims for monetary recovery are generally treated under the law."[225] Thus, "[w]hen there is no statute of limitations expressly applicable to a federal statute," and the federal claim involves a contract, "contract law provides the best analogy" and the court should "adopt the general contract law statute of limitations."[226] Thus, AT&T correctly relied on the applicable 6-year statute of limitations when seeking refunds of the amounts Alabama Power has taken in violation of law.[227]

IV. CONCLUSION

For the foregoing reasons, and those detailed in AT&T's Pole Attachment Complaint and the Affidavits, Declaration, and Exhibits in support of AT&T's Pole Attachment Complaint and this Reply, AT&T respectfully requests that the Commission find that Alabama Power charged and continues to charge AT&T unjust and unreasonable pole attachment rates in violation of federal law. AT&T further respectfully requests that the Commission set the just and reasonable rate, effective as of the 2012 rental year, as the rate that is properly calculated in accordance with

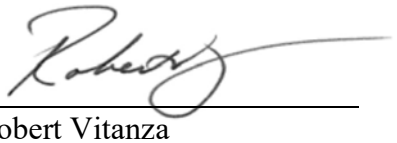
[225] *Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12).

[226] *Hoang*, 910 F.3d at 1101 (quoting *Cty. of Oneida*, 470 U.S. at 240).

[227] Alabama Code § 6-2-34(9).

the new telecom rate formula,[228] and order Alabama Power to refund all amounts paid in excess of a just and reasonable rate with interest,[229] beginning with the 2012 rental year.

Respectfully submitted,

By: 

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Dated: July 19, 2019

Attorneys for BellSouth Telecommunications, LLC d/b/a AT&T Alabama

[228] *See* Compl. Ex. A at ATT00007, -13-27 (Rhinehart Aff. ¶ 8, Ex. R-1). Alternatively, in the unlikely event that the Commission concludes that Alabama Power has met its burden to prove by clear and convincing evidence that the JUA provides AT&T a net material advantage over its competitors, AT&T respectfully requests that the Commission set the just and reasonable rate, effective as of the 2012 rental year, at a rate that is no higher than the rate that is properly calculated in accordance with the pre-existing telecom rate formula. *See id.* at ATT00010, -13-27 (Rhinehart Aff. ¶ 19, Ex. R-1).

[229] *See id.* at ATT00036-37 (Rhinehart Aff., Ex. R-3). Interest should be awarded at "the current interest rate for Federal tax refunds and additional tax payments." *Cavalier Tel., LLC v. Va. Elec. & Power Co*., 15 FCC Rcd 17962, 17964 (¶ 4 n.16) (2000).

INFORMATION DESIGNATION

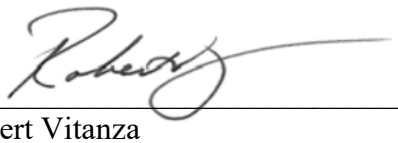
1. The AT&T employees and former employees with relevant information about this rental rate dispute are identified in AT&T's Pole Attachment Complaint, Pole Attachment Complaint Reply, and their supporting Affidavits and Exhibits.

2. Attached to this Pole Attachment Complaint Reply are Affidavits from AT&T employees involved in the rate negotiations, an Affidavit from an AT&T operational employee identifying flaws in Alabama Power's operational allegations, and a Declaration from outside expert Christian M. Dippon, Ph.D.

3. AT&T reserves the right to rely on information that is not appended to this Pole Attachment Complaint Reply as additional information becomes available.

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Pole Attachment Complaint Reply and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, I caused a copy of the foregoing Pole Attachment Complaint Reply, Affidavits, and Declaration in support thereof, to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554
(confidential version of Reply, Affidavits, and Declaration by hand delivery; public version of Reply, Affidavits, and Exhibits by ECFS)

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Alabama Public Service Commission
100 North Union Street
RSA Union Building
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Montgomery, AL 36104
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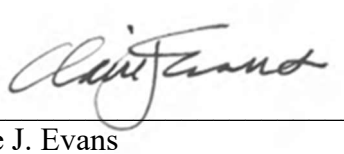

Claire J. Evans

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA, Complainant, v. ALABAMA POWER COMPANY, Defendant.	Proceeding No. 19-119 Bureau ID No. EB-19-MD-002

Reply Affidavits and Declaration

A. Affidavit of Daniel P. Rhinehart (July 19, 2019)

B. Affidavit of Dianne W. Miller (July 19, 2019)

C. Affidavit of Mark Peters (July 19, 2019)

D. Affidavit of Carla B. Little (July 18, 2019)

E. Declaration of Christian M. Dippon, Ph.D. (July 19, 2019)

Exhibit A

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA, Complainant, v. ALABAMA POWER COMPANY, Defendant.	Proceeding No. 19-119 Bureau ID No. EB-19-MD-002

REPLY AFFIDAVIT OF DANIEL P. RHINEHART
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF TEXAS)
) ss.
COUNTY OF WILLIAMSON)

I, Daniel P. Rhinehart, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Alabama ("AT&T"). As Director – Regulatory, I support AT&T and AT&T-affiliated entities with respect to the development of pole attachment rates pursuant to Federal Communications Commission ("FCC") and state formulas. I executed a prior Affidavit dated April 16, 2019 in support of AT&T's Pole Attachment Complaint against Alabama Power Company ("Alabama Power").[1] I am executing this Reply Affidavit to correct and respond to certain statements made by Alabama Power's witnesses in declarations and affidavits submitted with its June 21, 2019 Answer. I know the

[1] Compl. Ex. A at ATT0001-40 (Aff. of D. Rhinehart, Apr. 16, 2019).

following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

A. Mr. Conwell's Declaration Confirms The Validity Of My Rate And Overpayment Calculations.

2. I reviewed the rate and overpayment analyses provided by Alabama Power Senior Regulatory Analyst, Wesley L. Conwell, Jr.[2] They confirmed that my prior calculations were correct, and that Alabama Power has inflated its calculations by using improper inputs that do not comply with the FCC's methodology.

1. The New Telecom Rates Included In My Prior Affidavit Were Properly Calculated.

3. In my prior Affidavit, I calculated the per-pole rental rates that result from the FCC's new telecom rate formula for AT&T's use of Alabama Power's poles during the 2011 through 2017 rental years. I also reserved the right to update my calculations based on my review of the data and calculations submitted by Alabama Power with its Answer. Having reviewed Mr. Conwell's calculations, the supporting information he provided, and his criticisms of my calculations, I conclude that the new telecom rental rates that I previously calculated and attached as Exhibit R-1 to my prior Affidavit are the "just and reasonable" new telecom rates for AT&T's use of Alabama Power's poles.

4. *First*, Mr. Conwell criticizes my deduction of accumulated deferred taxes from net plant figures when calculating net pole investment.[3] My calculation is correct, as net pole investment is calculated under the FCC's methodology by reducing the gross investment shown

[2] Answer Ex. B at APC000055-74 (Conwell Decl.).

[3] *Id.* at APC000060 (Conwell Decl. ¶ 14).

in FERC Form 1 for Account 364 (Poles, Towers & Fixtures), by the depreciation and deferred tax reserves assigned or allocated to this account.[4] By failing to deduct the accumulated deferred taxes, Mr. Conwell inappropriately computes a higher net pole investment than permitted. Moreover, he criticizes my adherence to the FCC formula based only on the claim that Alabama Power's "cost of capital includes deferred taxes as a zero cost item."[5] He fails to note, however, that I did *not* include deferred taxes as a zero cost item in my calculation of Alabama Power's weighted average cost of capital.[6] Accordingly, I was consistent in my calculation of net pole investment and weighted average cost of capital by excluding deferred taxes from each.

5. *Second*, Mr. Conwell provided a different calculation of Alabama Power's weighted average cost of capital.[7] Mr. Conwell did not provide the source data for his calculation, whereas my calculation of Alabama Power's weighted average cost of capital was based entirely on publicly reported data from Alabama Power's FERC Form 1 filings. For that reason, my calculation is the more reliable calculation of Alabama Power's weighted average cost of capital. The difference between the two, however, is immaterial. I used the data that Mr. Conwell provided to calculate a weighted average cost of capital that does not include deferred taxes as a zero cost item (consistent with FCC methodology). The resulting value had no material effect on my new telecom rental rate calculations. Mr. Conwell's data produced a new

[4] *Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Order on Reconsideration, 16 FCC Rcd 12103, 12122-123 (¶ 32), 12161 (¶ 121), 12176 (App'x E-2) (2001) ("*2001 Consolidated Order*").

[5] Answer Ex. B at APC000060 (Conwell Decl. ¶ 14).

[6] Compl. Ex. A at ATT00028-35 (Rhinehart Aff., Ex. R-2).

[7] Answer Ex. B at APC000070-72 (Conwell Decl., Ex. B-1).

telecom rate that was up to 6 cents lower than the rate I previously calculated and was never more than 4 cents higher than the rate I previously calculated.

6. *Third*, Mr. Conwell criticizes my calculations for "omit[ting] the portion of overhead grounds that is included in the CATV and CLEC rates per Exhibit A to the CATV and CLEC pole license agreements."[8] I was correct not to include this investment in overhead grounds. Mr. Conwell is referencing one of Alabama Power's "modifications" to the FCC's new telecom formula, in which it has decided to calculate pole cost to include "one-half of [Alabama Power's] investment in overhead grounds (booked in FERC Account 365) to be included in the per pole investment calculation."[9] The Commission expressly rejected the inclusion of these amounts in the pole cost calculation:

> We decline to add portions of Accounts 365 or 368 to the net cost of a bare pole factor…. We affirm our conclusion that … grounding installations recorded in accounts other than Account 364 should not be included in the calculation of the net cost of a bare pole factor.[10]

Mr. Conwell's inappropriate inclusion of this investment booked in Account 365 has a material impact on the resulting rates, because it added [redacted] of dollars each year ([redacted] for the 2017 rental year) to Alabama Power's calculation of its net pole cost investment.[11]

7. Because Mr. Conwell's criticisms are misplaced, I continue to conclude that the properly calculated new telecom rates for AT&T's use of Alabama Power's poles during the

[8] *Id.* at APC000060 (Conwell Decl. ¶ 14).

[9] Compl. Ex. 2 at ATT00148 (CLEC License); Compl. Ex. 3 at ATT00186 (Cable License).

[10] *In re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6475 (¶ 38) (2000).

[11] *See* Answer Ex. B at APC000062-69 (Conwell Decl., Ex. B-1).

2011 through 2017 rental years are $8.10, $7.80, $7.66, $7.84, $7.53, $7.58, and $8.35 per pole, respectively.[12]

2. Mr. Conwell's Rates Do Not Comply With The New Telecom Rate Formula.

8. Throughout the year that AT&T negotiated with Alabama Power, I (or others on my behalf) asked Alabama Power to disclose its new telecom rental rates and the data it used to calculate them.[13] The Commission's 2011 *Pole Attachment Order* made the new telecom rate relevant to the determination of just and reasonable rates for incumbent local exchange carriers ("ILECs") and the Commission's 2018 *Third Report and Order* set the new telecom rate as the presumptive just and reasonable rate for an ILEC with a "new or newly-renewed pole attachment agreement."[14] As a result, a discussion of the new telecom rate and its calculation was necessary—indeed, essential—to negotiate the just and reasonable rate for AT&T's use of Alabama Power's poles.

9. Alabama Power was not forthcoming. It provided two redacted license agreements that include a graphic of the Commission's cable and new telecom formulas, but Alabama Power redacted the actual rates that it calculated and stated that it makes "clarifications and modifications" to the rate formulas.[15] It was, therefore, impossible to know with certainty what rates Alabama Power has charged AT&T's competitors or whether they were properly calculated when I filed my prior Affidavit. Now that I have had an opportunity to review Mr.

[12] Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 13 & Ex. R-1).

[13] *See, e.g.*, Compl. Ex. 7 at ATT00207; Compl. Ex. 9 at ATT00212; Compl. Ex. 16 at ATT00271-272.

[14] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7770 (¶ 127 n.475) (2018) ("*Third Report and Order*").

[15] *See* Compl. Ex. 2 at ATT00148 (CLEC License); Compl. Ex. 3 at ATT00186 (Cable License).

Conwell's calculations, I have concluded that they do not comply with the FCC's new telecom rate formula for several reasons.

10. *First*, Mr. Conwell's calculations evidence each of the errors discussed above, specifically, he does not deduct accumulated deferred taxes from net plant figures when calculating net pole investment, he modifies his weighted average cost of capital calculation to include deferred taxes as a zero cost item, and he incorrectly adds [redacted] of dollars in grounds recorded in FERC Account 365 as part of the investment in the net bare pole cost.[16] He also does not attempt to isolate depreciation reserves for poles as appropriate, but instead applies a generalized total plant depreciation reserve ratio in estimating pole investment reserves.[17] These errors have a material impact on the resulting rates; for example, keeping all other inputs consistent, Mr. Conwell calculated a [redacted] new telecom rate for the 2016 rental year, for which I properly calculated a $7.58 per pole new telecom rate.[18]

11. *Second*, Mr. Conwell shows that Alabama Power inappropriately delayed implementation of the Commission's new telecom formula until 2015. The Commission adopted the new telecom formula in 2011 to "provide a reduction in the telecom rate" so that it would "in general, approximate the cable rate."[19] The new telecom rate formula took effect in mid-2011,

[16] *See* ¶ 6, above.

[17] *See* Answer Ex. B at APC000062-69 (Conwell Decl., Ex. B-1).

[18] Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 13); Answer Ex. B at APC000058 (Conwell Decl. ¶ 8). Similarly, Mr. Conwell's 2015 new telecom rate is [redacted], when my properly calculated new telecom rate for 2015 is $7.53 per pole. Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 13); Answer Ex. B at APC000058 (Conwell Decl. ¶ 8).

[19] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5305 (¶ 149) (2011) ("*Pole Attachment Order*").

but Alabama Power did not implement it until 2015.[20] Mr. Conwell glosses over this failure to adhere to Commission rules by falsely claiming that these were "years [that] preceded the time at which the CATV and CLEC rates came into rough equivalency."[21] The extent of the overcharge is significant; during the period in which Alabama Power delayed implementation of the Commission's new telecom formula, it charged CLECs rates that were [redacted] the rates that would result from [redacted].[22]

12. *Third*, Mr. Conwell incorrectly states that a "one-foot CLEC rate [may be] multiplied" by the amount of "usable space occupied" by an attacher to calculate the rate where an attacher occupies more than one foot of space.[23] This is incorrect. The Commission has held that multiple-foot occupancy by an attacher cannot be assessed as a simple multiple of a one-foot new telecom rate.[24] Rather, the new telecom formula includes a "space occupied" input that can be adjusted if reliable, actual data show that a communications attacher occupies, on average, more than the presumptive one foot of space on a utility's poles.[25] Adherence to the formula is

[20] *See* Final Rule, *A National Broadband Plan for Our Future*, 76 Fed Reg. 26620-02 (2011) (announcing June 8, 2011 effective date for new telecom rate formula); *see* Answer Ex. B at APC000059 (Conwell Decl. ¶ 10) (stating that the "CATV and CLEC rates" were not in "rough equivalency" until 2015).

[21] *See* Answer Ex. B at APC000059, 62-65 (Conwell Decl. ¶ 10, Ex. B-1) (omitting [redacted] from 2011 – 2014 rate calculations).

[22] [redacted]

[23] *Id.* at APC000058 (Conwell Decl. ¶ 10).

[24] *Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (the Commission's rate formulas "determine the maximum just and reasonable rate *per pole*") (emphasis added).

[25] *See* 47 C.F.R. § 1.1406(d)(2).

crucial because proper application of the formula ensures that the unusable space on the pole is equally divided among the attaching entities as required.[26] Mr. Conwell's multiplication approach would instead allow Alabama Power to significantly over-recover for the unusable space by double-collecting (or more) from certain attachers. Mr. Conwell apparently recognizes the flaws in his multiplication approach because he uses the "space occupied" input when calculating rates under the pre-existing telecom rate formula.[27]

13. *Fourth*, Mr. Conwell departs from the presumptive input for space occupied by a communications attacher (1 foot), but only when calculating rates for AT&T.[28] The use of the presumptive value, however, is required for all communications attachers, including AT&T, because Alabama Power has offered no credible, statistically reliable data that rebuts the presumption. Mr. Conwell uses an [redacted] value,[29] apparently relying on Alabama Power's flawed argument that AT&T should be assigned 3.33 feet of safety space and [redacted] feet of space based on cable sag mid-span (*i.e.*, mid-way between two poles).[30] The Commission already found that the 3.33 feet of safety space is "usable and used by the electric utility."[31] Alabama

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[26] *See* Compl. Ex. A at ATT00005 (Rhinehart Aff. ¶ 6) (showing space factor calculation); *see also* 47 U.S.C. § 224(d)(2) (requiring "equal apportionment of [unusable space] costs among all attaching entities").

[27] *See* Answer Ex. B at APC000059 (Conwell Decl. ¶¶ 11-13). Mr. Metcalfe acknowledges this as well, as he states that a new telecom rate for one foot of space occupied is [redacted] of the pole cost, and that a new telecom rate for two feet of space occupied is [redacted] of the pole cost—and not double the [redacted] one-foot rate. *See* Answer Ex. D at APC000146 (Metcalfe Aff., Ex. D-7).

[28] *See* Answer Ex. B at APC000058-59, 62-69 (Conwell Decl. ¶¶ 10, 12, Ex. B-1); 47 C.F.R. § 1.1410.

[29] Answer Ex. B at APC000058 (Conwell Decl. ¶ 10).

[30] Answer ¶ 12.

[31] *Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) ("the 40-inch safety space … is usable and used by the electric utility."); *see also* Reply Ex. C at ATT00336 (Peters Reply Aff. ¶ 9).

Power concedes that it cannot lawfully charge AT&T's competitors for use of that safety space, and for the same reason, it cannot lawfully charge AT&T for the space.[32] And the [redacted] foot measurement is wholly unreliable and insufficient to rebut the presumption. It was acquired by Sherri T. Morgan, Alabama Power's Joint Use Team Leader, from a contractor who "reviewed data" from pole attachment applications "processed during 2017 and 2018" that "collectively included 4,303 Alabama Power poles to which AT&T was attached."[33] This sample of unidentified poles, reflecting a fraction of one percent of the Alabama Power poles to which AT&T is attached, is neither random nor verifiable.[34] The purported mid-span measurements were not taken on the pole, and so they do not reflect the space occupied on the pole.[35] And Alabama Power did *not* find the same data set sufficiently reliable to use to rebut the Commission's 37.5-foot presumptive pole height value.[36] Alabama Power has thus not provided statistically valid data that rebut the presumption that a communications attacher occupies, on average, one foot of space.[37]

[32] *See* Answer ¶ 12 n.39 (admitting that "the Commission has already determined that CATV and CLEC attachers should not bear this cost").

[33] Answer Ex. C at APC000077-78 (Morgan Decl. ¶ 7).

[34] *See also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866, 19869 (¶¶ 18, 25) (2002) (requiring that survey data be "statistically valid" and submitted).

[35] *See* 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on pole "space occupied").

[36] *See* Compl. Ex. A at ATT00005-6 (Rhinehart Aff. ¶¶ 7-8); Compl. Ex. 2 at ATT00150 (CLEC License); Compl. Ex. 3 at ATT00188 (Cable License); *see also* Answer Ex. C at APC000079 (Morgan Decl. ¶ 11) (stating that the "same data set Pike Engineering reviewed for purposes of ascertaining the height of AT&T's attachments" produced a [redacted]-foot average "height of an Alabama Power-owned joint use pole"); Answer Ex. B at APC000062-69 (Conwell Decl., Ex. B-1).

[37] 47 C.F.R. § 1.1410.

3. Mr. Conwell Incorrectly Calculates Pre-Existing Telecom Rates and Overpayments.

14. In my prior Affidavit, I calculated AT&T's overpayments as compared to just and reasonable rates by comparing the net rental amount that AT&T has paid Alabama Power to the net rental amount that AT&T would have paid if both companies paid proportional new telecom rates. My overpayment calculation, attached as Exhibit R-3, showed that AT&T overpaid Alabama Power by [redacted] in net pole rent for the 2012 through 2017 rental years using proportional new telecom rates. Mr. Conwell has not criticized any aspect of my calculation (aside from the new telecom rates that I calculated for AT&T's use of Alabama Power's poles), and it remains the correct valuation of AT&T's overpayment for the 2012 through 2017 rental years.

15. I also calculated AT&T's overpayments as compared to the net rental amount that AT&T would have paid if both companies paid proportional rates calculated using the FCC's pre-existing telecom rate formula, meaning the telecom rate formula in effect prior to the 2011 *Pole Attachment Order*. I completed that calculation because the FCC set pre-existing telecom rates as a "hard cap" under the 2018 *Third Report and Order*, and as a "reference point" under the 2011 *Pole Attachment Order*, on the rental rate that may be charged an ILEC that has net benefits under a joint use agreement that materially advantage the ILEC over its competitors.[38] As with the new telecom rates he calculated for AT&T and AT&T's competitors, Mr. Conwell produced improperly inflated pre-existing telecom rates and then used them to distort my overpayment calculation.[39] He erred on both counts.

[38] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

[39] Answer Ex. B at APC000059-60, 74 (Conwell Decl. ¶¶ 12-13, 15, Ex. B-1).

16. *First*, Mr. Conwell's pre-existing telecom rate calculations incorporate all of the errors detailed above with respect to his new telecom rate calculation, except for one: he agrees that the "space occupied" input must be adjusted if a pole owner has valid reliable data (Alabama Power does not) to rebut the presumption that a communications attacher occupies, on average, one foot of space.[40] Mr. Conwell, however, makes an additional error when calculating the pre-existing telecom rates. Specifically, he "assumes" an average of [redacted] attaching entities,[41] when the presumptive average number of attaching entities is 5 because Alabama Power's service area includes urbanized areas.[42] Alabama Power has not rebutted that presumption. Although it claims that it calculated an average of [redacted] attaching entities using some undisclosed "mapping data,"[43] it does not use that data to calculate its new telecom rates. Instead, Alabama Power uses the presumptive average of 5 attaching entities when calculating his new telecom rates for AT&T and for AT&T's competitors.[44] That Alabama Power does not consider its data sufficiently reliable or credible to use in calculating rates for AT&T's competitors is telling. The principle of competitive neutrality dictates that such data should not be used to calculate rates for AT&T. Regardless, the data is not sufficient to rebut the presumption in the first place.[45]

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[40] *See* ¶ 12, above.

[41] *See* Answer Ex. B at APC000059 (Conwell Decl. ¶ 12) ("if we assume an average of [redacted] attaching entities…").

[42] *See* 47 C.F.R. § 1.1409(c); *see also* Compl. Ex. A at ATT00005-6 (¶ 8).

[43] *See* Answer ¶ 26; Answer Ex. C at APC000078 (Morgan Decl. ¶ 10).

[44] *See* Compl. Ex. A at ATT00005-6 (Rhinehart Aff. ¶¶ 7-8); Compl. Ex. 2 at ATT00150 (CLEC License); Compl. Ex. 3 at ATT00188 (Cable License); *see also* Answer Ex. B at APC000062-69 (Conwell Decl., Ex. B-1).

[45] *See Teleport Commc'ns Atlanta, Inc*., 17 FCC Rcd at 19866, 19869 (¶¶ 18, 25) (requiring "statistically valid" survey data); *see also* Reply Aff. C at ATT00335 (Peters Reply Aff. ¶ 8).

17. *Second*, Mr. Conwell provides a meaningless pre-existing telecom overpayment calculation that pairs my properly-calculated and proportional pre-existing telecom rates for Alabama Power's use of AT&T's poles with his inflated and improperly-calculated pre-existing telecom rates for AT&T's use of Alabama Power's poles.[46] This is a worthless exercise that fails to assign to Alabama Power "the same proportionate rate … given [its] relative usage of the pole (such as the same rate per foot of occupied space)."[47])." My pre-existing telecom overpayment calculation, in contrast, assigns proportional rates to the parties, and accurately shows that AT&T overpaid Alabama Power by [redacted] in net pole rent for the 2012 through 2017 rental years as compared to proportional pre-existing telecom rates.[48]

B. Ms. Boyd and Ms. Morgan Have Misrepresented AT&T's Good Faith Negotiations.

18. As I stated in my prior Affidavit, I have personal knowledge of AT&T's good faith negotiations with Alabama Power for a just and reasonable pole attachment rate. I attended two face-to-face meetings with executives from Alabama Power, the first on June 1, 2018 and the second on February 22, 2019. Ms. Boyd, Power Delivery Technical Services General Manager at Alabama Power, and Ms. Morgan, Joint Use Team Leader at Alabama Power, attended both meetings, along with other Alabama Power representatives. I disagree totally and completely with their allegation that I, or any other member of the AT&T team, approached and conducted the negotiations in bad faith.[49] Their self-serving assertions are simply untrue.

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[46] *See* Answer Ex. B at APC000060, 74 (Conwell Decl. ¶ 15, Ex. B-1).

[47] *See Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.62).

[48] Compl. Ex. A at ATT00011, 37 (Rhinehart Aff. ¶ 22, Ex. R-3).

[49] Answer Ex. A at APC000032-38 (Boyd Decl. ¶¶ 16-32); Answer Ex. C at APC000083-84 (Morgan Decl. ¶¶ 22-24).

19. Throughout the negotiations, AT&T and Alabama Power had diametrically opposed views about AT&T's right to a just and reasonable rate for use of Alabama Power's poles under the JUA. That disagreement was present from the beginning of the negotiations. At the first executive-level meeting, Kyle Hitchcock, who was then Associate Director of AT&T's National Joint Utilities Team, and I explained that AT&T's request was for just and reasonable rates based on the terms and conditions of the parties' Joint Use Agreement ("JUA"). AT&T indicated that, to the extent Alabama Power wanted to discuss other contract terms, AT&T would be open to that discussion at a later date. Alabama Power saw things differently. Their representatives expressed the view that the FCC rate formulas do not apply to ILECs, that the rates charged under existing JUAs were not affected by the Commission's 2011 *Pole Attachment Order*, and that it would not negotiate rates independently from other terms of the JUA.

20. This merits disagreement continued throughout our negotiations. That, and not bad faith on either side, was the reason that our negotiation failed. I considered each of our meetings to be cordial, comprehensive, and business-like. Each party explained the merits of its position at length. And, although representatives for both parties were firm in the merits of their arguments, no one was discourteous. We simply did not see eye to eye. AT&T thought that rates could and should be dealt with on a stand-alone basis, and Alabama Power did not.

21. One aspect of our negotiations that I found particularly frustrating was Alabama Power's refusal to disclose its new telecom rates and calculations. It was not unreasonable to ask for this information. By rule, Alabama Power is required to supply "all information necessary" to calculate rates using the FCC's formulas within 30 days of a request from a CLEC or cable company.[50] And the Commission's 2011 *Pole Attachment Order* and 2018 *Third Report and*

[50] 47 C.F.R. § 1.1404(f).

Order both make the new telecom rate relevant to the determination of a just and reasonable rate for an ILEC.[51] But Alabama Power refused to disclose its new telecom rate and calculations during our negotiations—thereby forcing AT&T to file a pole attachment complaint to obtain the information that should have been part of a good faith effort to resolve this dispute.

22. Alabama Power did provide us two pieces of information during the negotiations, specifically, (1) two redacted license agreements from which the applicable new telecom and cable rates were redacted,[52] and (2) a 2017 annual pole cost of [redacted].[53] These two pieces of information were not sufficient "to calculate Alabama Power's CATV and CLEC pole attachment rates," as Ms. Boyd claims.[54] The license agreements included a graphic of the Commission's rate formula and alerted us to Alabama Power's decision *not* to follow the FCC methodology in its entirety.[55] And, a lot of information—including Alabama Power's rate of return, which it contends is confidential—is required to translate the [redacted] value that Alabama Power provided into a per-pole rental rate. Indeed, the [redacted] pole cost value for 2017 that Alabama Power provided does not even appear in Mr. Conwell's 2017 rate calculation.[56]

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[51] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217). In addition, we only needed to ask for the new telecom rate to understand the range of rates referenced in the Commission's 2011 and 2018 *Orders* because the pre-existing telecom rate can be easily derived from the new telecom rate. In particular, a properly calculated new telecom rate for use of Alabama Power's poles using the Commission's presumptive inputs is 0.66 the pre-existing telecom rate. This means that the pre-existing telecom rate is 1.51 the properly calculated new telecom rate (1 / 0.66 = 1.51).

[52] *See* Compl. Ex. 2 at ATT00148 (CLEC License); Compl. Ex. 3 at ATT00186 (Cable License).

[53] *See* Compl. Ex. 13 at ATT00258.

[54] *See* Answer Ex. A at APC000034 (Boyd Aff. ¶ 21).

[55] *See* Compl. Ex. 2 at ATT00148 (CLEC License); Compl. Ex. 3 at ATT00186 (Cable License).

[56] *See* Answer Ex. B at APC000068 (Conwell Decl., Ex. B-1).

23. By refusing to simply disclose the new telecom rates and calculations that Alabama Power finally disclosed in this complaint proceeding, Alabama Power complicated the negotiations and made them more costly for AT&T and more burdensome for my team. It fell on us to find and interpret Alabama Power's publicly available data, and it was still impossible to know the confidential aspects Alabama Power's calculations. I find it particularly ironic that Alabama Power now complains that I asked too many questions about accounting matters at the parties' second executive-level meeting. I only asked the questions because Alabama Power had not provided its calculations, and AT&T wanted to negotiate with Alabama Power based on a correct understanding of the new-telecom rate—and not based on one that was too low or too high because of Alabama Power had chosen to conceal the relevant information. In other words, my questions are further proof that AT&T attended the second executive-level meeting, as it had conducted the entire negotiation, in good faith and with a sincere desire to avoid the need for this complaint proceeding.

C. Mr. Metcalfe's Valuations Are Irrelevant And Fatally Flawed.

24. I have reviewed the affidavit submitted by Kenneth Metcalfe, which purports to demonstrate the value obtained by AT&T from the mere existence of the JUA. This, of course, does not speak to the only question that is relevant, which is whether the JUA provides AT&T a net material advantage over its competitors. But even beyond its irrelevance, each of Mr. Metcalfe's valuation theories is fatally flawed.

25. Mr. Metcalfe does not clarify whether he intends his valuation theories to be mutually exclusive or cumulative.[57] But they cannot be cumulative, as they are both redundant and conflicting. They also inappropriately seek to embed one-time non-recurring expenses into

[57] Answer Ex. D at APC000128 (Metcalfe Aff., Ex. D-1).

an ongoing recurring rate, lack any reasonable link to reality or common sense, count the same flawed costs multiple times, and flatly ignore and violate principles that have long been established by the Commission. They should be rejected.

26. *First*, Mr. Metcalfe alleges that the evergreen clause in the JUA, by letting AT&T continue using joint use poles after its termination, provides AT&T a "benefit of the bargain" that he values as though AT&T would have to be ready to fully and completely replace every joint use pole on which AT&T is attached within 90 days of the termination of the JUA.[58] This is, of course, absurd. Even Mr. Metcalfe states that Alabama Power's primary pole supplier could only supply about 500 poles per week;[59] at that pace, AT&T would need 24 years to acquire the poles that he claims are necessary. And Mr. Metcalfe completely ignores the reality that dueling pole lines are and have long been contrary to the public interest and the preference of local jurisdictions and homeowners. Mr. Metcalfe nonetheless claims to value this spurious "benefit" by charging AT&T for "estimated avoided contingency costs" that account for the cost "to procure and store poles" and a second time for "estimated avoided replacement costs" that account for the cost "to procure and install poles."[60] In other words, he charges AT&T twice for the cost to procure the same poles that joint use has rendered unnecessary. All the while, Mr. Metcalfe admits that the evergreen clause does *not* competitively advantage AT&T because "Alabama Power is required by the FCC to provide mandatory access to CLECs and CATVs."[61]

[58] *Id.* at APC000097-98 (Metcalfe Aff. ¶¶ 17-18).

[59] *Id.* at APC000098 (Metcalfe Aff. ¶ 19).

[60] *See, e.g.*, *id.* at APC000128 (Metcalfe Aff., Ex. D-1).

[61] *Id.* at APC000093 (Metcalfe Aff. ¶ 9).

In recognizing that "ILECs are at a material disadvantage compared to CLECs and CATVs,"[62] Mr. Metcalfe concedes that his ridiculous theory is irrelevant.

27. *Second*, Mr. Metcalfe assumes that, without the JUA, Alabama Power would have constructed its own pole network and AT&T would, at unsourced and unproven present-day costs, pay "make-ready" to replace every Alabama Power pole on which AT&T is attached. This, of course, cannot be cumulative to Mr. Metcalfe's prior theory because here he assumes that Alabama Power would have built its pole lines and then AT&T would have come along right behind and paid make-ready costs, including the cost of replacement poles. The theory has numerous flaws that further divorce it from reality. Two are particularly striking. First, Mr. Metcalfe ignores that the network has developed over time, when pole costs were lower and when AT&T was paying far higher rental rates than its competitors. Mr. Metcalfe includes no offsets or adjustments to account for these realities. Instead, he posits that AT&T would invest [redacted] in pole replacement costs to replace a fraction of Alabama Power's distribution network (630,000 poles of over 1.4 million distribution poles),[63] even though Alabama Power's entire investment in distribution poles as of the end of 2018 was more than [redacted] *lower* at $1.27 billion.[64] Second, Mr. Metcalfe assumes that every pole would require pole replacement make-ready—meaning that there would never be a case in which rearranging facilities within the communications space could accommodate AT&T.[65] But the Commission, relying in part on the representation of Alabama Power's sister company Georgia Power, found that "approximately 80

[62] *Id.* at APC000094 (Metcalfe Aff. ¶ 9).

[63] *Id.* at APC000137 (Metcalfe Aff., Ex. D-4.1).

[64] *See* Alabama Power 2018 FERC Form 1 at 207, line 64g.

[65] *See* Ex. D at APC000137 (Metcalfe Aff., Ex. D-4.1) (assuming 100% pole replacement make-ready).

percent of current make-ready work is 'simple'" make-ready that does not require a pole replacement.[66] Mr. Metcalfe's valuation is thus not only fanciful, but grossly exaggerated.

28. *Finally*, Mr. Metcalfe seeks to charge AT&T for space in a manner that conflicts with the Commission's rate methodology that sets rates based on the pole space that is occupied.[67] This theory is inconsistent with his first valuation, as AT&T would not need to pay for any space on Alabama Power's poles if AT&T deploys its own pole line. It is also wrong. Mr. Metcalfe ignores or is not aware of established FCC precedent that assigns the 3.33 feet of safety space to the electric utility.[68] He also does not appear to know that the [redacted] foot value he was provided for space occupied does not, in fact, reflect space occupied on the pole. Instead, he states that "[p]er Ms. Morgan, I understand that AT&T uses an average of [redacted] feet *on* Alabama Power's JUA poles."[69] Ms. Morgan's value was instead apparently measured mid-span between poles,[70] rendering it unusable for purposes of calculating rates under the FCC's formula. This valuation, like Mr. Metcalfe's other valuations, is thus fatally flawed and should be afforded no weight.

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[66] *Third Report and Order*, 33 FCC Rcd at 7714-15 (¶¶ 17-18 & n.64) (citing Ex Parte Letter from E. Langley, WC Docket No. 17-84 (Mar. 19, 2018)); *see also* Ex Parte Letter from E. Langley, WC Docket No. 17-84 (Mar. 19, 2018) ("more than 80% of make-ready poles require communications space make-ready only (in other words, no electric space make-ready)").

[67] 47 C.F.R. § 1.1406(d)(2).

[68] *See Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) ("the 40-inch safety space … is usable and used by the electric utility."). *But see* Answer Ex. D at APC000105-108 (Metcalfe Aff. ¶¶ 34-39).

[69] Answer Ex. D at APC000107 (Metcalfe Aff. ¶ 39) (emphasis added).

[70] *See* Answer Ex. C at APC000077-78 (Morgan Decl. ¶ 7).

D. Mr. Arnett's Cost Claims Are Wrong And Outdated.

29. Mr. Arnett provided a declaration that primarily discusses irrelevant topics, such as his own contract interpretation and ideas of fairness in the pre-competitive market of the 1970s through the early 1990s. He also made two incorrect statements about costs that I will address here.

30. *First*, Mr. Arnett claims that Alabama Power's carrying cost of joint use poles is [redacted] per pole higher than its carrying cost of non-joint use poles.[71] This cost comparison is irrelevant to any question of competitive neutrality, as AT&T and its competitors use Alabama Power's joint use poles. But it is also significantly overstated.

31. Mr. Arnett arrives at this figure by stating that there is a [redacted] difference between the average installed 35-foot bare pole and the average installed 40-foot bare pole.[72] Mr. Metcalfe, in contrast, states that the difference in material costs between a 35-foot pole and a 40-foot pole is [redacted].[73] To evaluate the cost difference between a hypothetical 35-foot pole and a hypothetical 40-foot pole at a single point in time, Mr. Metcalfe's value is the more appropriate value. With this one change, Mr. Arnett's per-pole difference is reduced by over [redacted] to a [redacted] per pole difference between the carrying cost of joint use poles and the carrying cost of non-joint use poles.[74]

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[71] Alabama Power provided this revised number late on July 15, 2019, less than 4 days before AT&T's July 19, 2019 Reply deadline. *See* Erratum to Answer (July 15, 2019). Given the short time I have had to evaluate the changes offered, I reserve the right to supplement my analysis.

[72] Answer Ex. E at APC000157 (Arnett Decl.).

[73] Answer Ex. D at APC000131 (Metcalfe Aff., Ex. D-2.1) (showing [redacted] material cost for 40-foot pole and [redacted] material cost for 35-foot pole, for a difference of [redacted]).

[74] Mr. Arnett uses a [redacted] annual charge rate which, when applied to the [redacted] difference, results in a [redacted] per pole value—rather than the [redacted] per pole value he reports. *See* Answer Ex. E at APC000534 (Arnett Decl. Erratum, Ex. E-11).

32. That number should be reduced further because Mr. Arnett uses an inflated [redacted] annual charge rate. But even using Mr. Arnett's inflated annual charge rate, the [redacted] per pole difference between the carrying cost of a joint use pole and a non-joint use pole confirms and reinforces the unreasonableness of the near-[redacted] per pole JUA rates that Alabama Power has been charging AT&T, in addition to the approximately [redacted] per pole rates charged AT&T's competitors for use of the same joint use poles.

33. *Second*, Mr. Arnett relies on a rather ancient Bell System Practice, titled Division of Cost Methods in Formulation of Joint Use Agreements, and dated September 1972. I disagree that this document establishes that the JUA rate methodology was ever just and reasonable. But it certainly cannot be disputed that the document does not establish that the JUA rate methodology is just and reasonable today. The document, which is just shy of 47 years old, could not account for the significant business, regulatory, legal, and economic changes that have occurred since 1972. Many of the fundamental assumptions of that time have been superseded by statute and FCC rulings about costs and rates. Cable companies were not given the right to just and reasonable rates until 1978, CLECs did not enter the market until 1996, and the right of ILECs to just and reasonable rates was not recognized until 2011.

34. That the Bell System Practice is outdated is apparent from a review of Alabama Power's interrogatory responses in this complaint proceeding. Mr. Arnett relies on the Bell System Practice because it divides the entirety of the pole cost between just two attachers.[75] Alabama Power's interrogatory responses tell a different story. Each year from 2011 through 2018, there were between [redacted] cable companies and between [redacted] CLECs with

[75] *Id.* at APC000160 (Arnett Decl.).

attachments on Alabama Power poles.[76] In 2018, Alabama Power had agreements with [redacted] ILECs, [redacted] cable companies, and [redacted] CLECS ([redacted] of which had active attachments on Alabama Power's poles).[77] In 2018, Alabama Power had over [redacted] CLEC and cable attachments on its poles.[78] It also has wireless addendums with several providers, [redacted] has wireless facilities on Alabama Power's poles.[79] The network of today bears little, if any, resemblance to the network on which Mr. Arnett relies when he seeks to perpetuate the outdated cost sharing methodologies of the pre-competition era. His analysis should be rejected.

Daniel P. Rhinehart

Sworn to before me on
this 19th day of July, 2019

Notary Public

HEATHER PARKS
My Notary ID # 126875060
Expires April 20, 2021

[76] Alabama Power Interrog. Resp. at APC00001-12.

[77] *Id.* at APC000011.

[78] *Id.*

[79] *Id.*

Exhibit B

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA, Complainant, v. ALABAMA POWER COMPANY, Defendant.	Proceeding No. 19-119 Bureau ID No. EB-19-MD-002

REPLY AFFIDAVIT OF DIANNE W. MILLER
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF SPARTANBURG)

I, Dianne W. Miller, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Alabama ("AT&T"). As Director – Construction & Engineering with responsibility for the National Joint Utility Team, I support AT&T and AT&T-affiliated incumbent local exchange carriers ("ILECs") with respect to the negotiation and implementation of joint use agreements with investor-owned, municipal, and cooperative utilities. I executed a prior Affidavit dated April 16, 2019 in support of AT&T's Pole Attachment Complaint against Alabama Power Company ("Alabama Power").[1] I am executing this Reply Affidavit to correct certain statements made by Alabama Power in its June

[1] Compl. Ex. B at ATT00041-51 (Aff. of D. Miller, Apr. 16, 2019).

21, 2019 Answer. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

A. AT&T Negotiated In Good Faith.

2. I vehemently disagree with Alabama Power's allegation that AT&T negotiated with Alabama Power in bad faith. I assumed responsibility for AT&T's stalled rate negotiations with Alabama Power in November 2018 when I became Director – Construction & Engineering with responsibility for the National Joint Utility Team. I approached, and at all times conducted, the negotiations with Alabama Power in good faith and I know that the rest of the AT&T negotiating team did as well. We were not able to reach a settlement, but I attribute that to each company's confidence in the merits of its position, and absolutely not to any bad faith or improper dealing by AT&T. Alabama Power's Answer is consistent with this conclusion, as it makes the same arguments on which it would not yield during our negotiations.

3. When I assumed responsibility for the negotiations, AT&T had already devoted significant time, effort and resources to trying to negotiate a just and reasonable rate with Alabama Power, but the negotiations were at a stalemate. At a first executive-level meeting in June 2018 and in a series of letters, AT&T had asked for a just and reasonable rate under the parties' Joint Use Agreement ("JUA") and explained its rationale; Alabama Power had responded that, notwithstanding the FCC's 2011 *Pole Attachment Order*, AT&T was not entitled to any rate relief under the JUA. Early in those prior negotiations, Alabama Power had agreed to promptly provide AT&T a rate offer, but it then delayed doing so for many months based on two false claims: 1) that Alabama Power needed information regarding the costs associated with AT&T's poles; and 2) that the parties first needed to negotiate "an entirely different operating

relationship"[2] or a different "going-forward agreement"[3]. AT&T's pole cost information already was in Alabama Power's possession or publicly available. Moreover, and importantly, the cost information was not necessary or germane to determine the just and reasonable rate Alabama Power charged AT&T for its use of Alabama Power's poles. Also, no new agreement was required to negotiate the just and reasonable rate for AT&T's use of Alabama Power's poles under the existing JUA. As a result, my predecessor Kyle Hitchcock wrote to Alabama Power in June 2018 that AT&T was "willing to discuss the other terms of our relationship, as I stated at our June 1 meeting. But we need to first quickly reduce the unjust and unreasonable rental rates that Alabama Power has long been charging us in violation of federal law so that we can better compete in today's market for broadband and other advanced services."[4] Alabama Power refused.[5]

4. By 2019, it seemed obvious that the negotiations were at an impasse. The parties already had participated in a face-to-face executive-level meeting and had exchanged several letters that showed that they viewed the law very differently. And AT&T had still not received the offer for a just and reasonable rate Alabama Power promised in June 2018.[6] I concluded that AT&T had every right to file a pole attachment complaint immediately and thought about doing so in order to more quickly realize the rental relief that AT&T requires. But I also knew that the

[2] Compl. Ex. 11 at ATT00217.

[3] Compl. Ex. 15 at ATT00268-269.

[4] Compl. Ex. 12 at ATT00256.

[5] *See, e.g.*, Compl. Ex. 13 at ATT00261 (refusing "AT&T's efforts to isolate the rate discussion"); Compl. Ex. 15 at ATT00269 ("It has always been Alabama Power's position that the [JUA] rate is inextricably intertwined with the other terms and conditions of the joint use agreement.").

[6] Compl. Ex. A at ATT00003 (Rhinehart Aff. ¶ 4).

Commission had issued its *Third Report and Order* in the summer of 2018—subsequent to the first executive-level meeting. I hoped that the rate presumption and additional guidance contained in the *Third Report and Order* would change Alabama Power's calculus to negotiate. And I thought that, if Alabama Power finally provided the offer it had promised, we could better assess whether there was a compromise to be made.

5. And so it was in the best of faith that I telephoned Pamela Boyd, Power Delivery Technical Services General Manager at Alabama Power, in January 2019. I was truly taken aback and disappointed to read Ms. Boyd's description of our subsequent negotiations. I found our conversations amicable, straightforward, and professional, and was surprised that she now claims that I did not negotiate in good faith or "engage[ ] in any thoughtful discussion."[7] In correspondence shortly following our meeting, she expressed far different sentiments, including appreciation that I reached out, thanks for the AT&T team's willingness to travel to Birmingham for a second executive-level meeting, and gratitude that we again explained our position to Alabama Power in person.[8]

6. I also disagree with much of what Ms. Boyd wrote in her Declaration about our negotiations and found it curious she thought it necessary to go into so much detail. To set the record straight, I will respond to several of her allegations.

7. First, Ms. Boyd says she did not agree to provide a settlement offer at or before our second executive-level meeting.[9] My recollection is quite different. In my initial phone call to her, I explained that AT&T thought a second executive-level meeting would be helpful only *if*

[7] Answer Ex. A at APC000037-38 (Boyd Decl. ¶ 32).

[8] *See, e.g.*, Compl. Ex. 16 at ATT00272; Compl. Ex. 19 at ATT00285.

[9] Answer Ex. A at APC000035 (Boyd Decl. ¶ 25).

Alabama Power was prepared to make an offer at the meeting or beforehand. Ms. Boyd agreed to schedule the meeting, and I expected that she would provide the offer. She confirmed my understanding in her February 6, 2019 email, where she said she "would like to be in a position to make a firm offer to AT&T *prior to* the February 22 meeting."[10] It was not until I was already on my way to Birmingham the afternoon before the meeting that Ms. Boyd emailed me to say that no offer would be made.[11]

8. Second, Ms. Boyd expresses surprise that at the second executive-level meeting AT&T wanted to talk about "the manner in which Alabama Power calculates annual pole cost for purposes of calculating its CATV and CLEC pole attachment rates" and says that we refused to talk about a new "going-forward relationship."[12] Sherri Morgan, Alabama Power Joint Use Team Leader, goes a step further and says that we "did not come to negotiate or discuss the relationship, but instead came to finalize information in preparation for their complaint."[13] I do not understand how they reached these conclusions.

9. Ms. Boyd and Ms. Morgan were or certainly should have been well aware that we wanted to know the new telecom rates that Alabama Power charges our competitors. AT&T asked Alabama Power to provide the new telecom rates it charges in AT&T's very first letter and at the June 1, 2018 executive-level meeting.[14] AT&T had asked Alabama Power to disclose its new telecom rate between the two meetings as well, but Alabama Power did not.[15] Instead, it

[10] Compl. Ex. 16 at ATT00272 (emphasis added).

[11] Compl. Ex. 17 at ATT00275.

[12] Answer Ex. A at APC000035-36 (Boyd Decl. ¶¶ 26-27).

[13] Answer Ex. C at APC000084 (Morgan Decl. ¶ 24).

[14] *See, e.g.*, Compl. Ex. 7 at ATT00208.

[15] *See* Compl. Ex. 14 at ATT00265.

provided two redacted license agreements that reveal that Alabama Power makes "modifications" to the new telecom formula, but it redacted the specific rates charged.[16] So I informed Ms. Boyd in advance of the second-executive-level meeting that we were still trying to understand what rate Alabama Power charges under the new telecom formula.[17] Especially following the Commission's adoption of the new telecom rate presumption, I thought we might be able to make progress if we could agree on the proper calculation of the new telecom rate. But Alabama Power still refused to disclose its new telecom rate at the second executive-level meeting. As a result, it was not until we received Alabama Power's interrogatory responses in this complaint proceeding that we finally learned the rates that Alabama Power calculates under its modified version of the new telecom rate formula.

10. I also disagree with the suggestion that AT&T refused to listen to Alabama Power's arguments about a new going-forward relationship. We listened very carefully and learned that, despite the *Third Report and Order*, Alabama Power remained steadfast in its view that the JUA rates are reasonable and that it would not negotiate new rates unless AT&T were to first "give up" something else (although it was never clear what). I explained again that AT&T did not want to negotiate a new agreement because it already has the right to just and reasonable rates under the JUA, just as I had explained to Ms. Boyd in an email before the meeting.[18] I did not, as Ms. Boyd implies, say that the reason AT&T did not want an agreement like Alabama Power's license agreements was because the JUA was somehow more advantageous. My clearly articulated position then and now is that the JUA is *already* materially comparable to Alabama

[16] Compl. Ex. 2 at ATT00148; Compl. Ex. 3 at ATT00186.

[17] Compl. Ex. 16 at ATT00271; Compl. Ex. 17 at ATT00277.

[18] *See* Compl. Ex. 17 at ATT00278.

Power's license agreements, so there is no reason to delay rate relief by negotiating another agreement that would also be materially comparable.

11. Third, I was surprised and disappointed that Ms. Boyd shared our subsequent exchange of confidential settlement offers because I understood that they were protected from disclosure under evidentiary rules. But I am even more surprised that Ms. Boyd claims that the settlement offer shows that AT&T "made the exact same demand AT&T had been making since June 1, 2018."[19] Even a cursory review of the confidential offers exchanged demonstrates that AT&T's proposal, in fact, included far more compromise than the modest and conditional proposal Alabama Power extended.

12. Finally, Ms. Boyd says that she was waiting to hear from me when AT&T filed its pole attachment complaint. I do not know what gave her that expectation. My final telephone call with Ms. Boyd was on April 3, 2019, when she called to reject AT&T's settlement offer. She stated that Alabama Power would not be making a counteroffer because AT&T had not offered to renegotiate the JUA. Once again, I told her that AT&T was not interested in changing the JUA in order to obtain the rate relief to which it has long been entitled, nor was AT&T willing to delay obtaining that rate relief on the promise that the parties would discuss rental rates at some point after all other aspects of the JUA had been renegotiated. With that, I knew that our negotiations were over. I cannot imagine why Ms. Boyd would expect AT&T to make yet a subsequent offer when Alabama Power had chosen not to make any counteroffer.

13. We did discuss some operational issues during the call because Ms. Boyd raised concerns about outstanding transfers and certain work that Alabama Power performs under the JUA. I let her know that I would be happy to talk with my field team partners to make sure they

[19] Answer Ex. A at APC000037 (Boyd Decl. ¶ 29).

were aware of the concerns she had raised and, consistent with my commitment, I shared Ms. Boyd's concerns with my colleagues. But I never told Ms. Boyd that AT&T would bid against itself and make another offer. I also was never under the impression that Ms. Boyd expected a return call. It was abundantly clear to me and so I thought we both understood that our companies were at an impasse. Alabama Power denied that any rate reductions were required by the Commission's 2011 *Pole Attachment Order* and 2018 *Third Report and Order* and made changing the JUA a precondition for AT&T to get another offer. AT&T did not want to complicate and delay the rate negotiations with contract negotiations that were not necessary, particularly since it seemed to me that the only purpose of Ms. Boyd's precondition was to further postpone AT&T's receipt of the just and reasonable rates required by law.

B. Alabama Power Has Not Justified The Rates It Charges AT&T.

14. I continue to disagree with Alabama Power's claim that AT&T receives material benefits operationally that advantage AT&T over its competitors, let alone net material benefits that justify the exorbitantly high rates that Alabama Power charges.

15. Alabama Power devotes much of its Answer to an argument that AT&T occupies more space on a pole than its competitors because it installs heavier cables that have more sag. Of course, cables do not sag *on a pole*. Alabama Power took its measurements mid-way between two poles, so its claim that AT&T occupies more pole space does not make sense.

16. Alabama Power's claim also is grounded in outdated stereotypes about the heavy copper cables that AT&T deployed a century ago. But not all copper cables are the same, and much of the copper AT&T has deployed on Alabama Power's poles is lightweight cable that is comparable in size to cable used by AT&T's competitors, including the coaxial cables used by cable companies that have a copper-clad core. In addition, Alabama Power's focus on copper cable ignores AT&T's transition to lightweight fiber facilities that are essentially identical to its

competitors' facilities. The following graph illustrates this transition by comparing the number of AT&T's annual aerial copper placements (blue) to the number of its annual aerial fiber placements (yellow) since 1994 in Alabama:

17. AT&T's network thus continues to significantly change and is very different today from the network reflected in the obsolete 1994 materials on which Alabama Power relies.[20] This is also apparent in data about the relative footage of AT&T cable and fiber cable placed since 1994 in Alabama. The following graph shows that the footage of copper cable that AT&T has placed in Alabama has precipitously declined in recent years. This is because copper cable is typically placed only when needed to repair a section of the copper cable network that has not yet transitioned to fiber. As more sections of the network transition to fiber, this decline in copper placements will continue.

[20] Answer Ex. E at APC000171-182 (Arnett Decl., Exs. E-3 to E-6).

18. Meanwhile, as shown in the following graph, the footage of fiber cable placed by AT&T in Alabama has increased to levels that far exceed its copper placements. Indeed, in 2018, AT&T placed [redacted] times the footage in fiber in Alabama as it placed in copper. Alabama Power's focus on historic placements entirely ignores the evolution of AT&T's network.

19. Alabama Power also claims that AT&T should pay for 3.33 feet of "safety space" on joint use poles, but that space is required because of the nature of Alabama Power's facilities. Alabama Power's attempt to assign that space on its poles to AT&T (and only AT&T) is particularly curious because AT&T's facilities are not usually adjacent to the safety space, but Alabama Power's facilities always are. Ms. Morgan, for example, included a graphic of a utility pole that shows 2 AT&T attachments occupying about 1 foot of space, then another communications attachment occupying about 1 foot of space, then the 3.33 feet of safety space,

and then Alabama Power's facilities occupying [redacted] feet of space.[21] AT&T's attachments do not touch the safety space in this illustration or in any of the photos that Ms. Boyd attached to her declaration.[22] The illustration and photographs also depict the absurdity of Alabama Power's claim that Alabama Power requires 7 feet of pole space, but AT&T somehow requires [redacted] feet.[23]

20. I completely and strenuously disagree with Alabama Power's criticism of AT&T's Construction & Engineering employees. Indeed, its sweeping allegation that AT&T lets the "joint use network degrade into logjam, danger and uselessness" is so absurd that it does not even merit a response.[24] It is telling that Alabama Power made this allegation without citation to any evidence or sworn testimony.[25] Instead, it attached photographs of thirteen poles which, I understand, erroneously identify facilities, fault AT&T for attachments on poles to which AT&T is not attached, and, in most cases, were not the subject of any prior notification through the National Joint Utilities Notification System ("NJUNS") or other agreed-upon means.[26]

21. I disagree with Alabama Power's remaining operational allegations, which are primarily hypothetical claims about what Alabama Power may have done decades ago if it was not required to share its poles with communications attachers. Alabama Power's musings about what it could have done are irrelevant to setting pole attachment rates in today's competitive

[21] Answer Ex. C at APC000086 (Morgan Decl., Ex. C-1).

[22] *See* Answer Ex. A at APC000041-54 (Boyd Decl., Ex. A-2); Answer Ex. C at APC000086 (Morgan Decl., Ex. C-1).

[23] *See, e.g.*, Answer ¶¶ 12, 29.

[24] *See id.* ¶ 13.

[25] *See id.*

[26] Reply Ex. D at ATT00349-360 (Little Reply Aff. ¶¶ 7-38).

environment. They are also contradicted by its own materials. Although Alabama Power now claims that, but for AT&T, it would have installed 35-foot poles to which only Alabama Power attaches, Alabama Power also assumes that it "would install 40-foot poles if it did not need to accommodate AT&T's attachments."[27] And, in any event, AT&T is not to blame for joint use. As the 1972 materials Alabama Power provided explain, [redacted]

22. For all these reasons, it remains my opinion that Alabama Power has not identified any net operational benefit that gives AT&T a material advantage over its cable and CLEC competitors that could justify AT&T's payment of a higher rental rate for use of Alabama Power's poles.

Dianne W. Miller

Dianne W. Miller

Sworn to before me on
this 19th day of July, 2019

WILLIAM J. CARTEE III
NOTARY
PUBLIC
SOUTH CAROLINA

Notary Public

William J. Cartee

[27] Answer Ex. D at APC000133 (Metcalfe Aff., Ex. D-3).

[28] Answer Ex. E at APC000227 (Arnett Decl., Ex. E-14).

Exhibit C

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA, Complainant, v. ALABAMA POWER COMPANY, Defendant.	Proceeding No. 19-119 Bureau ID No. EB-19-MD-002

REPLY AFFIDAVIT OF MARK PETERS
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF TEXAS)
) ss.
COUNTY OF TARRANT)

I, Mark Peters, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Alabama ("AT&T"). As Area Manager – Regulatory Relations, I support AT&T and AT&T-affiliated entities with respect to regulatory, legislative, and contractual matters involving joint use, utility poles, conduit, and ducts. I executed a prior Affidavit dated April 16, 2019 in support of AT&T's Pole Attachment Complaint against Alabama Power Company ("Alabama Power").[1] I am executing this Reply Affidavit to correct certain statements made by Alabama Power in its June 21, 2019 Answer. I know the following of my own personal knowledge and, if called as a witness in this action, I

[1] Compl. Ex. C at ATT00061-66 (Aff. of M. Peters, Apr. 16, 2019).

could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. As I stated in my prior Affidavit, I have over two decades of experience with AT&T-affiliated entities, which I refer to collectively as the "Company." For the past decade, I have been a subject matter expert on issues relating to the Company's joint use relationships with electric companies and since 2013, I have also provided support on matters relating to third-party access to Company-owned utility poles and conduit.

3. As the subject matter expert on issues relating to AT&T's joint use relationships, I have supported AT&T's effort to negotiate just and reasonable rates with Alabama Power since the negotiations began. I planned to attend AT&T's first executive-level meeting with Alabama Power, which was initially scheduled for May 18, 2018, but Alabama Power postponed the meeting and provided two alternative dates that fell within the span of my two-week annual tour in the U.S. Air Force Reserves. Because I did not want my military service to further postpone the discussions, Kyle Hitchcock, then Associate Director of AT&T's National Joint Utility Team, and Daniel Rhinehart, AT&T Director – Regulatory, proceeded in my absence.

4. In February 2019, I participated by telephone in AT&T's second executive-level meeting with Alabama Power. I strongly dispute Alabama Power's claim that my participation, and the participation of the other team members representing AT&T, was in bad faith. I approached the meeting optimistic that we could have a productive discussion, particularly if Alabama Power finally provided the offer for which we had been waiting for months. Instead, Alabama Power did not make an offer before the meeting and remained resolute during the meeting that it did not need to disclose to AT&T the new telecom rate that Alabama Power charges AT&T's competitors, notwithstanding the mandates of the FCC's 2011 *Pole Attachment*

Order and the 2018 *Third Report and Order* that would take effect shortly after the meeting. Nonetheless, I found the discussion cordial, professional, and thorough. As a result, the drama and outrage describing the negotiations in Alabama Power's Answer and supporting declarations came as a complete surprise to me. Indeed, it is not only false but just silly to suggest that we did not have "any familiarity with the operational relationship between the parties,"[2] "did not care at all about the operating relationship between the parties,"[3] and were "not there to negotiate in good faith."[4] I have supported AT&T's administration of the parties' Joint Use Agreement ("JUA") for 10 years and discuss operational issues with others at the Company on a daily basis. I had very much hoped that we could quickly negotiate just and reasonable rates with Alabama Power and avoid the delay inherent in a pole attachment complaint proceeding given the additional guidance provided in the Commission's 2018 *Third Report and Order*.

5. I also disagree with the substantive aspects of Alabama Power's Answer and supporting declarations and affidavit. Although Alabama Power submitted voluminous papers, nothing in those papers changed my conclusion that the JUA does not include more advantageous terms and conditions for AT&T than those that apply to AT&T's competitive local exchange carrier ("CLEC") and cable competitors. Consequently, AT&T should pay the same pole attachment rate as its CLEC and cable competitors.

6. Alabama Power argues primarily that the JUA provides value to AT&T as compared to a hypothetical world in which companies did not jointly use utility poles. That comparison is not relevant, however, to whether AT&T enjoys net material benefits relative to

[2] Answer Ex. A at APC000035 (Boyd Decl. ¶ 26).

[3] Answer Ex. C at APC000083 (Morgan Decl. ¶ 22).

[4] *Id.* at APC000084 (Morgan Decl. ¶ 24).

AT&T's competitors that also use Alabama Power's poles. Much of Alabama Power's argument is, therefore, beside the point. For example, Alabama Power argues that it costs more to own a joint use pole than it would cost to own a non-joint use pole.[5] Even if true, AT&T and its competitors both use the joint use poles. And, based on the pole height information Alabama Power provided, there should generally be space on Alabama Power's joint use poles to accommodate AT&T and its competitors without requiring a pole replacement or significant make-ready. Alabama Power states that its average pole height is [redacted] feet[6] and concedes that it would install [redacted] poles whether or not AT&T is attached.[7] Poles of these heights are sufficient to hold communications facilities for AT&T and its competitors.

7. Alabama Power also states that its average joint use pole height is [redacted] feet.[8] If true, although Alabama Power did not provide sufficient data to establish that it is, Alabama Power has confirmed that little (if any) make-ready should ever be required before an attachment is made in the communications space, and that it is further inflating the rental rates charged to AT&T's competitors by using the Commission's 37.5-foot pole height presumption in its rate calculations.[9] It is also not clear why Alabama Power has installed these taller joint use poles, but it appears to be based on Alabama Power's preferences, needs, or predictions about the highly competitive communications market. Alabama Power admits that its facilities require

[5] *See* Answer Executive Summary & ¶ 15.

[6] *See* Answer Ex. C at APC000079 (Morgan Decl. ¶ 11).

[7] *See* Answer ¶ 15; Answer Ex. D at APC000130 (Metcalfe Aff., Ex. D-2); *see also* Answer Ex. E at APC000156 (Arnett Decl.) (admitting that "[s]ince at least 1966, a 40' class 5 pole has been designated as the standard for new joint use poles").

[8] *See* Answer ¶ 15.

[9] *See* Compl. Ex. A at ATT00005-6 (Rhinehart Aff. ¶ 7); Compl. Ex. 2 at ATT00150 (CLEC License); Compl. Ex. 3 at ATT00188 (Cable License).

more space on a pole now than when Alabama Power was allocated 8 feet of space on a 40-foot pole in the JUA.[10] But Alabama Power then provides a seemingly conflicting statement that its current "standards" require less space (7 feet) than the space it was allocated (8 feet) in the JUA.[11] Alabama Power provides no evidence, however, that this 7-foot standard is routinely followed or reflects reality across Alabama Power's pole network. It would be unusual if it did reflect reality, because that would mean that Alabama Power admits that it installs 50-foot poles (since it says that its "average" joint use pole height is [redacted] feet) that include more than 15 feet of communications space even though communications attachers require about 1 foot of space and Alabama Power claims to average just 2 such attachers on its poles.[12] This would drive up rates for all of Alabama Power's attachers by deploying unnecessarily tall 50-foot poles, and then pairing their higher costs with the FCC's lower 37.5 foot presumed pole height.[13]

8. More likely, Alabama Power requires more than 7 feet of space for its own attachments and has provided an unreasonably low average number of attaching entities. Alabama Power bases its average number of attaching entities on "mapping data" that it has never provided to AT&T and did not provide in its Answer.[14] The average number of attaching entities obtained from that "mapping data" is suspect given the plethora of communications attachers in the market. It is also noteworthy that Alabama Power does not rely on the "mapping

[10] *See* Answer ¶ 29 ("[C]urrently, Alabama Power's distribution engineering design standard requires only 7 feet for a three-phase line …; previously, the standard required even less space").

[11] *Id.*

[12] *See* Answer Ex. C at APC000078 (Morgan Decl. ¶ 10). A 50-foot pole, with 6 feet underground, 18 feet of ground clearance, 3.33 feet of safety space, and 7 feet for Alabama Power, would still have 15.67 feet of space for communications attachers.

[13] *See* Compl. Ex. A at ATT00005-6 (Rhinehart Aff. ¶ 7); Compl. Ex. 2 at ATT00150 (CLEC License); Compl. Ex. 3 at ATT00188 (Cable License).

[14] *Id.*

data" to provide pole height measurements or to calculate rates for other communications attachers. In other words, Alabama Power does not find its "mapping data" sufficiently reliable when calculating rates for AT&T's competitors, but seeks to use that unreliable data to increase the rates it charges AT&T.

9. Alabama Power tries to confuse matters by inaccurately claiming that AT&T "constructively" occupies more than the 1 foot of space that is typically occupied, on average, by communications facilities.[15] These arguments should be rejected outright. Alabama Power claims that AT&T requires 3.33 feet of safety space, but the FCC has already found that such space is used by electric utilities and should not be charged to communications and cable attachers.[16] This makes sense because the safety space is regularly used for power company attachments, such as street lights, step-down distribution transformers, and grounded, shielded power conductors. It would defeat the principle of competitive neutrality to charge AT&T, but not its competitors, for safety space that none of them can occupy.

10. Alabama Power also claims that AT&T should pay more because its aerial facilities—like all aerial facilities—include some sag, which could be fifty feet or more from the pole. Alabama Power does not dispute that it must charge AT&T's competitors under the FCC's formulas only for "space occupied," and so cannot charge them for mid-span sag. And, while

[15] *See, e.g.*, Answer ¶ 12.

[16] *See Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) (stating that "the 40-inch safety space …. is usable and used by the electric utility"). To be sure, photographic evidence confirms that Alabama Power makes use of the very safety space for which it seeks to charge AT&T. *See* Compl. Ex. C at ATT00057 (Miller Aff., Ex. M-1) (showing picture of street light attached to pole within the safety space).

Alabama Power claims that AT&T uses "much thicker" cables than its competitors,[17] this appears to be based on nothing more than a broad and outdated generalization about AT&T's historic copper deployments as compared to its competitors' fiber deployments. As support, Alabama Power relies on a 1994 document that included all possible scenarios that could have then been encountered in the field.[18] Alabama Power's witness, Wilfred Arnett, expresses "surprise" that I did not rely on this 1994 document in my Affidavit.[19] I do not understand why he would be surprised. The document dates back a quarter-century to the time around Mr. Arnett's retirement from AT&T in 1996.[20] So much has changed since then. Indeed, that was the year that competition was introduced to the local exchange market, which rendered many assumptions and practices obsolete.

11. Contrary to Alabama Power's anecdotal and mistaken claims, AT&T's current network does not require materially greater space on average than the networks of its competitors. AT&T has devoted substantial resources in recent years to the deployment of thin,

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[17] *See, e.g.*, Answer Ex. A at APC000031 (Boyd Decl. ¶ 13).

[18] *See* Answer Ex. E at APC000152, 171-182 (Arnett Decl. & Exs. E-4 to E-6). Alabama Power's witness makes a particularly unfounded claim when he states that ILECs are attached at the lowest location on the pole because their facilities have the most sag. *Id.* at APC000153 (Arnett Decl.). As Alabama Power recognizes, the ILEC is typically at the lowest location on the pole because it was the only consistent communications attacher when joint use began. *See* Answer ¶ 20. As ILECs' space requirements have decreased, other attachers filled in above to maintain a consistent order of attachments that would permit easy identification of facilities and prevent the crisscrossing of cables mid-span.

[19] Answer Ex. E at APC000160 (Arnett Decl.).

[20] *Id.* at APC000150 (Arnett Decl.). Mr. Arnett relies on his post-retirement work on behalf of municipal and cooperative utilities to argue that AT&T should have renegotiated the JUA because AT&T has renegotiated joint use agreements. *Id.* at APC000160-161 (Arnett Decl.). AT&T's position, however, has not been that it would never renegotiate the JUA—only that it does not need to renegotiate the JUA in order to pay a "just and reasonable" rate. In addition, the results of those negotiations are irrelevant, as they were with entities that have substantial pole ownership leverage and are not subject to a statutory just and reasonable rate requirement. *See id.* at APC000160-161, 244-301 (Arnett Decl. & Exs. E-15, E-16).

lightweight fiber cables. It rarely deploys copper cables in its distribution network and, when it does, few (if any) are the size and weight of the copper cables installed 30, 40, or 50 years ago. In addition, the use of copper facilities does not distinguish AT&T from its competitors. The coaxial cables used by cable companies have a copper-clad core, and they are increasingly being overlashed multiple times, as some of Alabama Power's pictures show,[21] which increases their bundle size, thickness, weight, and amount of mid-span sag. There is, therefore, no good reason to charge AT&T for mid-span sag when every attacher (including Alabama Power) experiences it, but no one else (including Alabama Power) is charged rental rates based on it.

12. While irrelevant, Alabama Power's unsubstantiated mid-span measurements of AT&T's facilities are particularly suspect. Alabama Power claims that it asked its contractor to review pole attachment applications for 4,303 poles, reflecting a fraction of one percent (0.68%) of the Alabama Power poles to which AT&T is attached.

13. Alabama Power's mid-span sag arguments are additionally flawed because they are based on a speculative claim that AT&T would never allow any other entity to attach below its facilities.[22] AT&T generally remains the lowest attacher on the pole so that various communications facilities do not crisscross mid-span. This operates to the benefit of all attachers on a pole by eliminating confusion. Indeed, even though AT&T is generally the lowest attacher, even Alabama Power cannot reliably identify the owner of facilities attached to its poles.[23]

14. Another flaw throughout Alabama Power's Answer is its claim that joint use is somehow an option for AT&T. Alabama Power, for example, claims that AT&T could have

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[21] *See, e.g.*, Answer Ex. A at APC000042 (Boyd Decl., Ex. A-2) (showing a CATV bundle with 5 cables overlashed on one strand).

[22] *See, e.g.*, Answer Ex. C at APC000077-78 (Morgan Decl. ¶ 7).

[23] *See* Reply Ex. D at ATT00349-360 (Little Reply Aff. ¶¶ 8, 14, 23, 29, 37, 38).

built its own network instead of entering into the JUA, and that AT&T can remove its facilities from Alabama Power's poles at any time to avoid the excessive JUA rates.[24] These are fictions—commonly advanced by power companies to avoid reducing rental rates to comply with the law. The fact is that a single pole line was created in large part because municipalities and property owners wanted efficiency in the use of their rights-of-way and wanted to avoid communities having a forest of utility poles. That remains true today, as is readily apparent from the accelerated adoption of municipal ordinances regulating use of the public rights-of-way by communications attachers. Homeowners and local authorities do not want two pole leads on one street, if they can be avoided. Setting the aesthetic issues aside, it is inconceivable that state regulators over the past century would have considered it prudent for two rate-of-return regulated utilities sharing common ratepayers to build two duplicative pole lines instead of a single shared network.

15. In any case, AT&T must rely on Alabama Power's infrastructure to provide service throughout Alabama. This is also why Alabama Power's reliance on the evergreen provision in the JUA, asserting it as an advantage to AT&T, is so inappropriate.[25] If the JUA terminates, AT&T will not be able to attach to new Alabama Power pole lines and will have to gain approval for alternate infrastructure from the same local authorities and residents that do not want duplicative utility poles. In contrast, AT&T's CLEC and cable competitors have a statutory right to attach and maintain attachments to Alabama Power's poles—and their right of access does not end with the termination of a license agreement. The contractual right of access that

[24] *See, e.g.*, Answer Executive Summary & ¶¶ 11, 31; Answer Ex. D at APC000098 (Metcalfe Aff. ¶ 18).

[25] Answer ¶ 14.

AT&T must negotiate and secure is thus a significant competitive *disadvantage* as compared to the statutory right of access enjoyed by its competitors.

16. Alabama Power fails to account for other competitive disadvantages as well. For decades, AT&T has been paying far more for the right to attach to Alabama Power's poles than AT&T's competitors have paid, with no net competitive advantage in exchange. At the same time, AT&T has incurred substantial pole ownership costs to provide services in Alabama, while its competitors provide service without any pole ownership requirement. This significantly reduces their cost of providing services as compared to AT&T. By Alabama Power's own admission, AT&T has invested nearly [redacted] million since 2011 just to replace defective AT&T poles.[26] Alabama Power guesses that it could have charged CLECs or cable companies more to replace the poles.[27] But it is just a guess because CLECs and cable companies are not required to own poles—and so have not been required (as AT&T has been) to pay Alabama Power [redacted] million to replace defective poles.[28]

17. Throughout its Answer, Alabama Power criticizes AT&T for not owning more poles, even though that would only increase AT&T's costs as compared to its competitors. Alabama Power also fails to acknowledge its own role in the parties' increasing pole ownership

[26] Answer ¶ 16.

[27] *Id.*; Answer Ex. C at APC000081 (Morgan Decl. ¶ 14).

[28] Alabama Power's pole replacement cost comparison is also misleading. Alabama Power did not provide any source data, or a breakdown of the material and tasks included in the comparison. It suggests, however, that it only counts those "amounts each party is required to pay Alabama Power under its contracts." Answer ¶ 21. Due to that admission and the fact that AT&T's competitors do not own a significant number of poles (if any at all), I must conclude that Alabama Power is comparing replacements of unserviceable poles with replacements completed as part of make-ready work associated with the competitors' applications to attach, hardly an apples-to-apples comparison given the different cost principles that apply in those very different scenarios.

disparity. Under the JUA, Alabama Power is required to notify AT&T each time it thinks a new pole is needed "either as an extension of a service, as an additional service, or as reconstruction of an existing service" so that the parties can discuss who should own the pole.[29] I am not aware of Alabama Power ever providing AT&T a meaningful opportunity to own more poles, or otherwise offering to sell existing joint use poles. Instead, Alabama Power waited until AT&T asked for rate reductions to ask whether AT&T would purchase poles in lieu of seeking rental relief.[30] That request thus appears to be just another attempt to deny, delay, or increase the cost of AT&T obtaining the just and reasonable rate to which it is entitled, because a pole purchase would not provide AT&T a just and reasonable rate on the near-half million joint use poles that Alabama Power would still own.

18. Alabama Power's sweeping accusations about AT&T's maintenance of its pole plant and aerial facilities are grossly exaggerated and completely unjustified.[31] AT&T's workforce has extensive training related to safety and the installation and maintenance of aerial facilities. AT&T's construction managers are required to perform random inspections of work performed by technicians. And AT&T responds promptly when informed through the National Joint Utilities Notification System ("NJUNS") or other agreed-upon means that there is an issue with its facilities. It appears that Alabama Power instead chose to sit on its complaints, which prevented AT&T from resolving them prior to Alabama Power filing the Answer.[32] Proper and timely notification would have given AT&T an opportunity to determine whether there was a

[29] Compl. Ex. 1 at ATT00107 (JUA, Art. VII(A)).

[30] *See* Answer ¶¶ 29, 31.

[31] *See, e.g.*, Answer ¶ 13; Answer, Ex. A at APC000031-32 (Boyd Decl. ¶ 15); Answer Ex. C at APC000082 (Morgan Decl. ¶ 19).

[32] *See* Reply Ex. D at ATT00349 (Little Reply Aff. ¶ 7).

violation (for some there was not), whether its facilities were involved (Alabama Power misidentified many), and whether other attachers had completed their make-ready work that had to precede AT&T's work to remedy the issue (often the answer was no).[33]

19. Alabama Power's failure to timely notify AT&T of alleged violations says more about Alabama Power's practices than it does about AT&T and the other attachers' practices. Even if an AT&T facility is currently out of compliance with some standard, that does not mean that AT&T caused the problem or has any basis for knowing that it exists. AT&T is constantly on watch for issues when it performs work throughout Alabama, but it has facilities on more than 809,000 poles in Alabama Power's service area alone and cannot monitor each and every one of them on a daily basis. It is regularly the case that AT&T properly installed its attachment in the first instance, but the facility was taken out of compliance when other work was performed on the pole by Alabama Power or a third party attacher.[34] In addition, AT&T is rarely the cause of a "transfer delay." Many times, AT&T cannot complete the required transfer because of inaction or extended completion times by third parties that must first complete work.[35] Also, at times, the transfer work is highly complex because Alabama Power placed a replacement pole so far from the original pole that it requires AT&T to complete otherwise unnecessary splicing work to move a pole riser, terminal, or fiber relief loop.[36]

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[33] *See id.* at ATT00349 (Little Reply Aff. ¶ 8).

[34] *See, e.g.*, *id.* at ATT00354-355 (Little Reply Aff. ¶¶ 21-22) (discussing Example Location 4 from Boyd Decl., Ex. A-2).

[35] *See, e.g.*, *id.* at ATT00351, -356 (Little Reply Aff. ¶¶ 12, 25, 27) (discussing Example Locations 1, 6, and 7 from Boyd Decl., Ex. A-2).

[36] *See, e.g.*, *id.* at ATT00358 (Little Reply Aff. ¶ 33) (discussing Example Location 11 from Boyd Decl., Ex. A-2).

20. One final issue that runs throughout Alabama Power's Answer is its criticism of my characterization of certain terms in the JUA as reciprocal terms that eliminate any "net" value to AT&T.[37] Alabama Power acknowledges that these reciprocal terms have a "cancelling effect," but argues that it should only be proportional to the number of poles owned by each party.[38] But Alabama Power relies on terms that have equal effect on Alabama Power and AT&T. Because Alabama Power and AT&T have facilities on an equal number of joint use poles, Alabama Power's insurance and liability-sharing arguments apply equally to the parties.[39] Similarly, because each party has facilities on every joint use pole, the requirement that each party rearrange its own facilities when required by the other applies equally.[40] Alabama Power also relies on a security bond requirement in its license agreements that would apply equally for a different reason: Alabama Power set a maximum coverage amount that is reached when an attacher has 100,000 attachments.[41] Alabama Power and AT&T each have more than 100,000 attachments, so the reciprocity of this provision is also complete.

[37] *See* Answer Executive Summary & ¶¶ 13, 22, 23; *see also, e.g.*, Answer Ex. D at APC000111 (Metcalfe Aff. ¶ 47).

[38] *See* Answer ¶ 13.

[39] *See* Compl. Ex. 2 at ATT00137-139 (CLEC License ¶¶ 26, 27); Compl. Ex. 3 at ATT00176-179 (Cable License ¶¶ 26, 27).

[40] *See* Compl. Ex. 1 at ATT00106 (JUA, Art. VI(B)).

[41] *See* Compl. Ex. 2 at ATT00153 (CLEC License, Ex. D); Compl. Ex. 3 at ATT00191 (Cable License, Ex. D) (capping coverage at $2.5 million, calculated using $25/attachment rate).

21. For all of these reasons and those expressed in my prior Affidavit, it remains my opinion that Alabama Power has not identified any net benefit that gives AT&T a material advantage over its cable and CLEC competitors that could justify AT&T's payment of a higher rental rate for use of Alabama Power's poles.

Mark Peters

Sworn to before me on
this 19th day of July, 2019

Notary Public

PIEDAD ORNELAS
Notary Public, State of Texas
Comm. Expires 09-06-2021
Notary ID 131270168

Exhibit D

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA, Complainant, v. ALABAMA POWER COMPANY, Defendant.	Proceeding No. 19-119 Bureau ID No. EB-19-MD-002

REPLY AFFIDAVIT OF CARLA B. LITTLE
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF ALABAMA)
) ss.
COUNTY OF MOBILE)

I, Carla B. Little, being sworn, depose and say:

1. I am employed by BellSouth Telecommunications, LLC d/b/a AT&T Alabama ("AT&T"), the Complainant in this matter. I am executing this Reply Affidavit to correct false and misleading statements made regarding 13 utility poles depicted in photographs attached to the Declaration of Pamela Boyd, Power Delivery Technical Services General Manager at Alabama Power Company ("Alabama Power") submitted in support of Alabama Power's June 21, 2019 Answer to AT&T's Pole Attachment Complaint. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. My job title is Director – Alabama/Northwest Florida Outside Plant Engineering. I am based in Mobile, Alabama. In my current role, I oversee all aspects of the design and engineering of AT&T's facilities deployed within Alabama and the Florida Panhandle, including fiber, copper, electronic, and other facilities deployed in underground, buried, and aerial environments (underground is in conduit and buried is directly buried in dirt). My responsibilities, therefore, include AT&T's aerial attachments to Alabama Power's joint use utility poles, as well as AT&T's aerial attachments to all other utility poles in Alabama and the Florida Panhandle. As a result, I am familiar with AT&T's Joint Use Agreement ("JUA") with Alabama Power, as well as with the agreements and engineering practices that govern aerial communications facilities throughout Alabama.

3. I have over 30 years of experience in the telecommunications industry with AT&T and its predecessor companies. I was hired by South Central Bell Telephone Company in 1987 as an Equipment Engineer based in Birmingham, Alabama. I have since had a series of increasingly senior engineering roles in Alabama, including jobs as Outside Plant Construction Supervisor, Outside Plant Engineer, and Area Planning Manager. I assumed my current job in September 2015. I have a BA in Electrical Engineering from the University of Alabama at Birmingham, where I was the President of Eta Kappa Nu, a national electrical engineering honor society.

4. My Outside Plant ("OSP") Engineering team consists of approximately 120 engineers and administrative staff based in locations throughout Alabama and Northern Florida, including Birmingham, Huntsville, Mobile, Montgomery, and Tuscaloosa. My OSP Engineering team has a field presence throughout AT&T's overlapping service territory with Alabama Power and is responsible for administering the day-to-day operational aspects of the JUA, including the

design, installation, and maintenance of joint use attachments, work relating to pole installations, replacements, and transfers, pole loading issues, and compliance with the National Electrical Safety Code ("NESC").

5. When I reviewed Ms. Boyd's Declaration, I was concerned about her allegation that there are "violations," "overloading issues," and "transfer delays" associated with AT&T's attachments on Alabama Power's poles.[1] I was also suspicious. Her allegation seemed grossly exaggerated, as she made the incredible accusation that "it is almost impossible to drive more than 5 minutes in the Birmingham area … and not see AT&T lines" with these issues.[2] My experience is the exact opposite. She also provided 13 photographs of "example locations," that did not appear to support her allegation.[3] But AT&T is vigilant in the maintenance of its network, so I assembled a team of OSP engineers to investigate the claims and determine whether remedial action was needed.

6. For each pole location, I asked my team of OSP engineers to first determine whether there was an open ticket in the National Joint Utilities Notification System ("NJUNS") or some other form of prior notification. NJUNS is a web-based system that AT&T and Alabama Power use to coordinate engineering work and is the appropriate place to report issues like those alleged by Ms. Boyd. Neither AT&T nor Alabama Power can monitor their facilities on all 809,000 jointly used poles on a daily basis, so we rely on this reporting system to alert one another to problems in the field and pole replacements that require a transfer of the other party's facilities. NJUNS is a valuable resource because it is far more often the case that problems arise

[1] *See* Answer Ex. A at APC000031-32 (Decl. of Pamela Boyd (June 20, 2019) ("Boyd Decl.") ¶ 15).

[2] *Id.* at APC000031 (Boyd Decl. ¶ 15).

[3] *Id.*; *see also id.* at APC000041-54 (Boyd Decl., Ex. A-2).

after AT&T has properly installed its attachment. Upon investigation, we regularly find that the cause of a problem is work performed by some entity other than AT&T, such as Alabama Power or a third-party CATV or CLEC attacher.

7. My team learned that there were open NJUNS tickets for just 2 of the 13 field locations identified by Alabama Power (Locations 4 and 12), and that we could not locate any other forms of notification for the 13 locations. Ms. Boyd thus chose to report issues about 11 locations through Alabama Power's filing rather than through the system designed for that purpose. Not only that, the photographs of the locations were taken in late May and early June,[4] so Alabama Power sat on these alleged issues for approximately three weeks before notifying AT&T about them through the June 21 Answer. Such behavior is not consistent with good pole maintenance and safety practices.

8. I also asked my team to visit each pole location, review and inspect the conditions alleged by Alabama Power, and perform any necessary diagnostic tests. I reviewed and managed their work. Based on their reports, it is my conclusion that the photographs do not support Ms. Boyd's allegations. The descriptions of the poles and the attachments at the 13 locations are riddled with factual inaccuracies and baseless conclusions. At four locations (Locations 2, 5, 8, and 13), Alabama Power misidentifies the attachments, stating that facilities belong to AT&T—they do not. At six locations (Locations 3, 8, 9, 10, 11, and 12), AT&T's facilities do not have any violations, overloading issues, or transfer delays. At three locations (Locations 2, 3, and 7), it is Alabama Power that is in violation. And at three locations (Locations 1, 6, and 7), AT&T

[4] *See id.* at APC000041-54 (Boyd Decl., Ex. A-2) (reflecting date stamps that show the photographs were taken between May 29, 2019 and June 5, 2019).

cannot complete the transfer because other work must first be completed by third-party attachers. A detailed analysis of the findings of my team at each location follows.

Location 1 (APC000042)

9. Alabama Power alleges that the pole at this location is a 50-foot pole with two AT&T attachments, and three other communications attachments, and that AT&T has a violation and transfer delay.[5] None of this is true. The pole at this location is a 45-foot pole, as shown in this photograph of its birthmark. (The notation "4-45" means it is a Class 4, 45-foot pole).

10. There is only one AT&T facility at this location, not two. In addition, none of the communications facilities photographed at this location are, in fact, attached to the pole. It is likely that Alabama Power replaced the pole at this location, but did not give any of the communications attachers notice of the replacement and the need to transfer their facilities to the replacement pole. This can happen when poles are replaced due to an emergency.

11. Alabama Power did not indicate what "violation" it perceives at this location, but it circled mid-span sag in its photograph:

[5] Answer Ex. A at APC000031-32, 42 (Boyd Decl. ¶ 15 & Ex. A-2).

The sag is mainly the result of not being attached to the replacement pole. It was also partially attributable to a dead pine tree, a portion of which was laying on the line, but which is difficult to see from Alabama Power's picture. My team has trimmed the tree to eliminate its contribution to the sag at this location.

12. There is no transfer delay on the part of AT&T at this location. The attachers with the four cables above AT&T's cable must complete their transfers first before AT&T would receive an NJUNS transfer notification for this pole indicating that AT&T is "next-to-go" (*i.e.*, next in line to transfer).

Location 2 (APC000043)

13. Alabama Power alleges that AT&T has a violation and overloading issue with respect to the following pole.[6] This is not true.

[6] Answer Ex. A at APC000031-32, 43 (Boyd Decl. ¶ 15 & Ex. A-2).

14. AT&T has no attachments on this pole. AT&T has buried its facilities in this area. The lowest cable shown is a CATV facility that does not belong to AT&T.

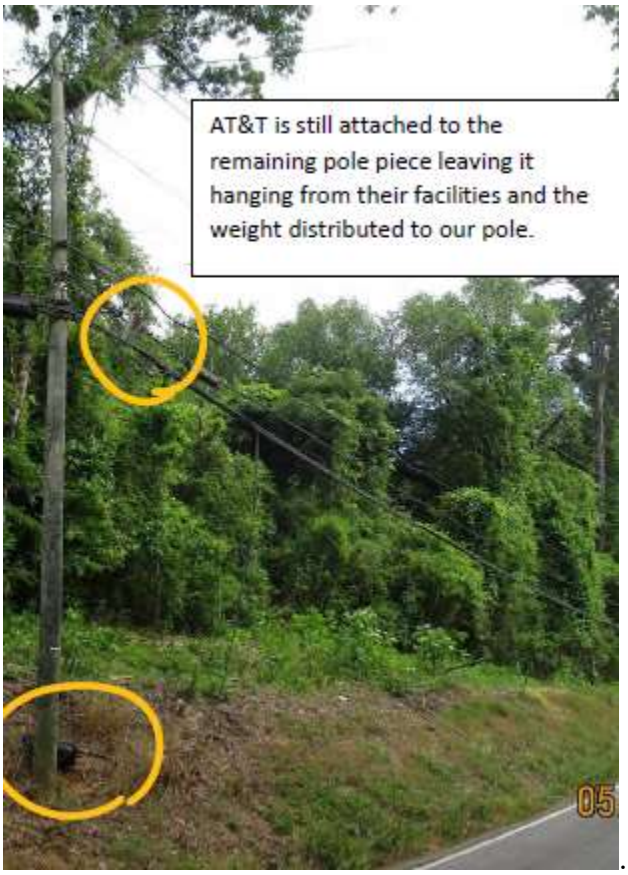
15. Nevertheless, my team's field review revealed numerous safety issues with this pole on the part of Alabama Power. Among other things, the pole is cracked in two places (see circled areas in the pictures below).

16. Also, Alabama Power's anchors have been pulled from the ground:

17. We have notified Alabama Power of issues with this pole via NJUNS (ticket #3982890).

Location 3 (APC000044)

18. Alabama Power alleges that AT&T has a violation and transfer delay with respect to the pole at this location because AT&T "is still attached to the remaining pole piece leaving it hanging from their facilities and the weight distributed to our pole."[7] This is not true.



19. The circled object in the middle of the picture is not a "remaining pole piece," but instead a properly placed pole terminal. Accordingly, there is no violation or transfer delay because there is nothing to transfer. Alabama Power also circled a fiberoptic splice closure near the base of the pole, which is now properly attached to the nearby strand. Alabama Power misrepresented that the lowest midspan sag of AT&T's facilities at this location is 8'4". My

[7] Answer Ex. A at APC000031-32, 44 (Boyd Decl. ¶ 15 & Ex. A-2).

team discovered that the proper measurement is 9'9", a clearance that is acceptable under the NESC because this is a pedestrian-only area.[8]

20. While at this location, we identified a problem with Alabama Power's facilities, in that the portion of the pole with its facilities is dangerously leaning because Alabama Power's overhead guy has too much slack and needs to be tightened. We have notified Alabama Power of this safety issue via NJUNS (ticket #3982902).

Location 4 (APC000045)

21. Alabama Power alleges that AT&T has a violation at this location, and circled the area on the photograph below.[9] This issue was likely caused by Alabama Power's failure to coordinate with AT&T when Alabama Power replaced this pole. We believe that someone other than AT&T (most likely Alabama Power or its contractor) temporarily reattached AT&T's facility at the wrong height, although the alleged clearance of 16'7" is not a violation under the NESC[10]:

[8] *See* NESC Table 232-1 (permitting minimum clearance of 9'6" over pedestrian areas).

[9] Answer Ex. A at APC000031-32, 45 (Boyd Decl. ¶ 15 & Ex. A-2).

[10] *See* NESC Table 232-1 (permitting minimum clearance of 15'6" over roads, streets, and other areas subject to truck traffic).

22. AT&T was not aware that it could complete the transfer at this location prior to receiving Alabama Power's Answer because the NJUNS transfer ticket associated with this pole was incorrectly built by Alabama Power—it excludes the attachment above AT&T's attachment, which belongs to the City of Birmingham (indicated by the red arrow in the picture above). Since being made fully aware of the issue through Alabama Power's Answer, AT&T has completed the transfer by placing a new anchor rod and permanently transferring our cable facility at the correct height.

Location 5 (APC000046)

23. Alabama Power alleges that AT&T has a violation at this location, presumably because it measured a midspan clearance of 10'5" as the "lowest AT&T midspan point."[11] The cable with the 10'5" midspan clearance, however, is a CATV cable and does not belong to AT&T.

Location 6 (APC000047)

24. Alabama Power has circled a potential clearance issue at this location:[12]

[11] Answer Ex. A at APC000031-32, 46 (Boyd Decl. ¶ 15 & Ex. A-2).

[12] Answer Ex. A at APC000031-32, 47 (Boyd Decl. ¶ 15 & Ex. A-2).

25. AT&T had no prior notification of this issue. Based on my team's field investigation following receipt of Alabama Power's Answer, we determined that the issue was created by Alabama Power replacing the pole on the other side of the span without notifying AT&T, necessitating a transfer to raise the midspan clearance. AT&T cannot complete that transfer, however, until the CATV attachment above AT&T's attachment is transferred.

Location 7 (APC000048)

26. Alabama Power alleges that AT&T has a violation and overloading issue at this location:[13]

27. As for the alleged violation, Alabama Power presumably is concerned about the sag at this location, but we found that it resulted from Alabama Power's replacement of a pole on the north side of this span (*i.e.*, the pole to the right of the pole depicted), which resulted in AT&T's facilities being temporarily tied to that new pole, presumably by Alabama Power (or its contractor). Completing the transfer will resolve any sag issues, but AT&T cannot complete the transfer until the CATV attacher finishes its transfer.

[13] Answer Ex. A at APC000031-32, 48 (Boyd Decl. ¶ 15 & Ex. A-2).

28. As for the alleged overloading issue, it resulted from Alabama Power's failure to install an adequate sidewalk guy. AT&T's load analysis shows that if Alabama Power places a sidewalk guy or larger class pole, load would be within tolerance.[14] We have notified Alabama Power of this safety issue via NJUNS (ticket #3982904).

Location 8 (APC000049)

29. Ms. Boyd does not allege that AT&T has any issues at this location,[15] and we did not identify any. However, this example highlights the basic unreliability of her photographs, as the exhibit erroneously states that there are "6 AT&T attachments" and "0 other attachment[s]" at this location when, in fact, the highest attachment shown is a CATV attachment.

Location 9 (APC000050)

30. Ms. Boyd does not allege that AT&T has any issues at this location,[16] and we did not identify any. Alabama Power, however, incorrectly describes this pole as a 40-foot pole when it is a 50-foot pole:

[14] *See* Exhibit D-1 (load analysis for Location 7).

[15] Answer Ex. A at APC000031-32, 49 (Boyd Decl. ¶ 15 & Ex. A-2).

[16] Answer Ex. A at APC000031-32, 50 (Boyd Decl. ¶ 15 & Ex. A-2).

Location 10 (APC000051)

31. Alabama Power alleges that AT&T has an overloading issue at this location:[17]

32. AT&T's load analysis did not identify any overloading concerns.[18]

Location 11 (APC000052)

33. Alabama Power alleges that AT&T has an overloading issue at this location.[19] AT&T's load analysis did not identify any issues.[20] We did note that, to the extent there is any overloading, it resulted from Alabama Power's decision to set a replacement pole at this location at a great distance from the original pole for no apparent topographical reason. This created complex transfer issues that could have been avoided.

[17] Answer Ex. A at APC000031-32, 51 (Boyd Decl. ¶ 15 & Ex. A-2).

[18] *See* Exhibit D-2 (load analysis for Location 10).

[19] Answer Ex. A at APC000031-32, 52 (Boyd Decl. ¶ 15 & Ex. A-2).

[20] *See* Exhibit D-3 (load analysis for Location 11).

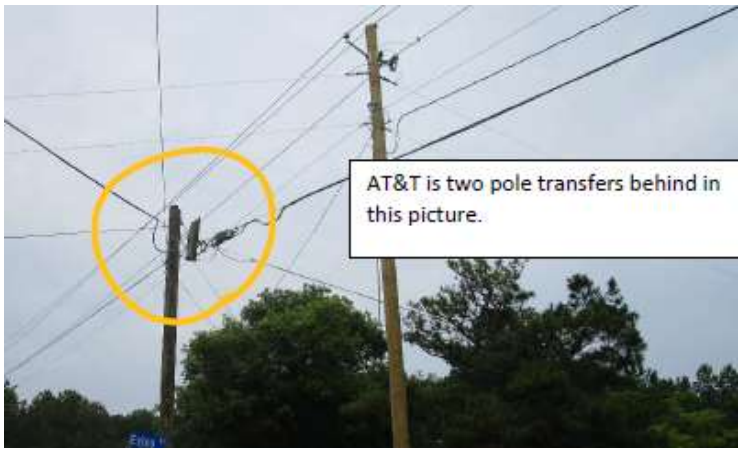
Location 12 (APC000053)

34. Alabama Power alleges that AT&T has an overloading issue and transfer delay at this location.[21] AT&T's load analysis did not identify any issues.[22] Alabama Power has misrepresented the replacement pole as a 50-foot pole when its pole tag identifies it as a 45-foot pole, as shown below (the notation "4 45" means it is a Class 4, 45-foot pole):

35. AT&T expects to complete the transfer required at this location by July 26, 2019.

Location 13 (APC000054)

36. Alabama Power alleges that AT&T has a transfer delay at this location, stating that "AT&T is two pole transfers behind in this picture."[23]



[21] Answer Ex. A at APC000031-32, 53 (Boyd Decl. ¶ 15 & Ex. A-2).

[22] *See* Exhibit D-4 (load analysis for Location 12).

[23] Answer Ex. A at APC000031-32, 54 (Boyd Decl. ¶ 15 & Ex. A-2).

37. Once again, Alabama Power is wrong. AT&T has no facilities on this pole because the location is not within AT&T's franchise service area and has never been. The attachments belong to Spectrum and Windstream.

38. In sum, Ms. Boyd's allegations about AT&T's maintenance of the joint use network are meritless. We were troubled that Alabama Power has not been providing AT&T proper and timely notification of potential issues, so that AT&T can promptly respond. We were discouraged that Alabama Power failed to acknowledge that it had caused some of the very problems it was complaining about. And we were surprised to see so many obvious factual inaccuracies when Alabama Power should have ready access to basic information about pole height, number, type, and ownership of attachments, and whether a pole is even within the parties' overlapping service territory.

39. For all of these reasons, the Commission should reject Alabama Power's meritless allegations about AT&T's maintenance of its joint use network and aerial facilities.

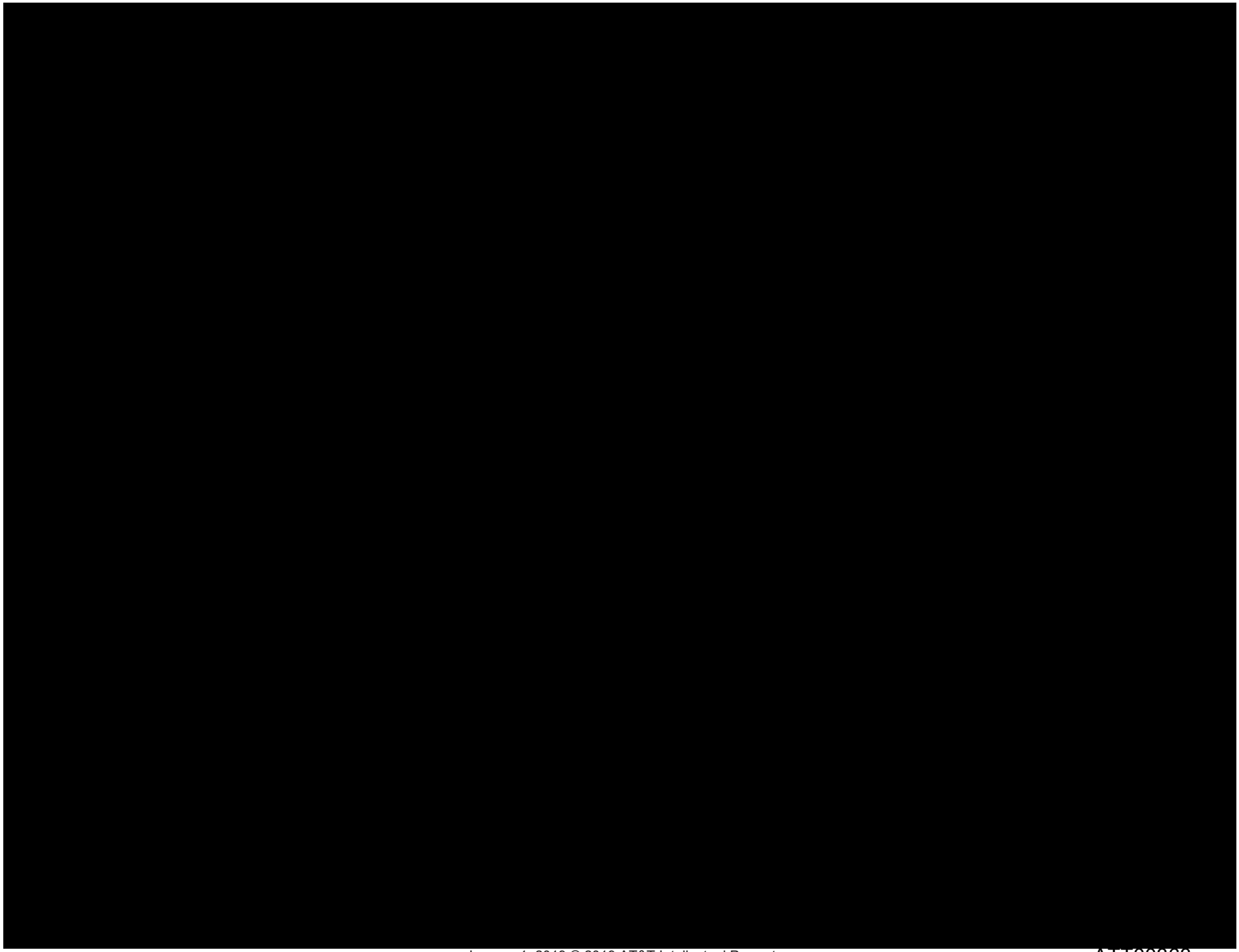
Carla B. Little

Sworn to before me on
this 18th day of July, 2019

Catherine Kelley
Notary Public

My commission expires
2/24/2021

Exhibit D-1



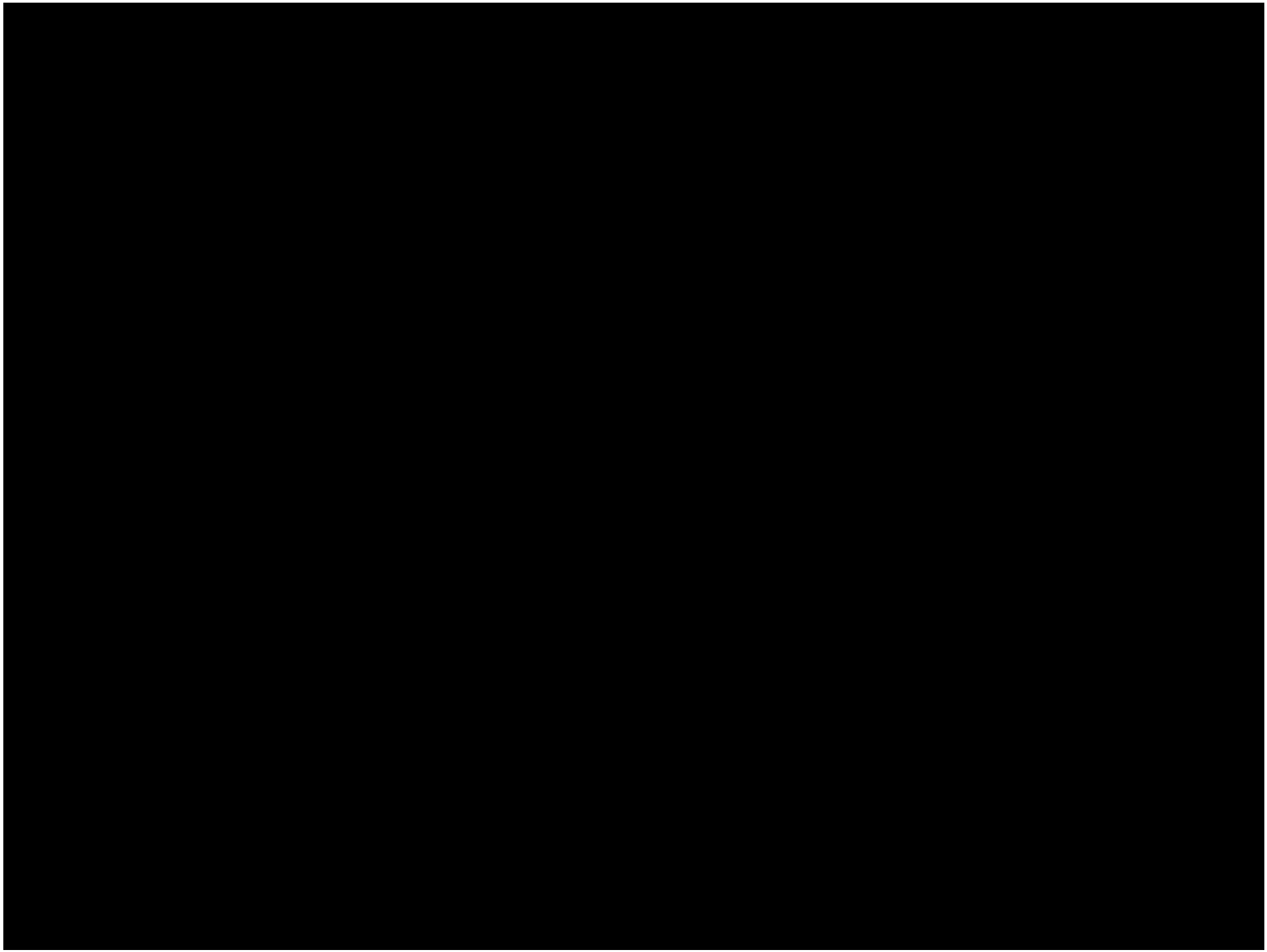
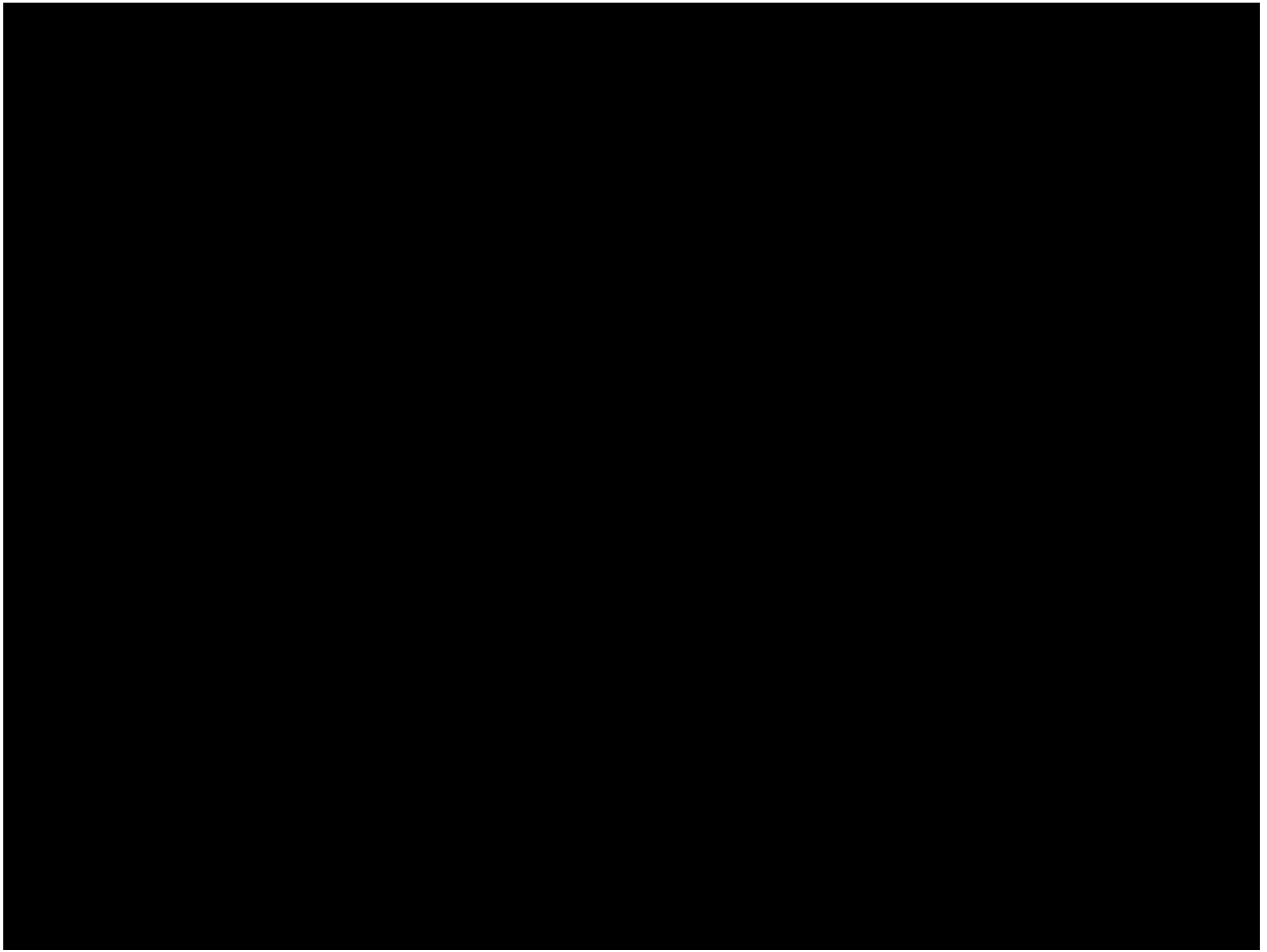


Exhibit D-2



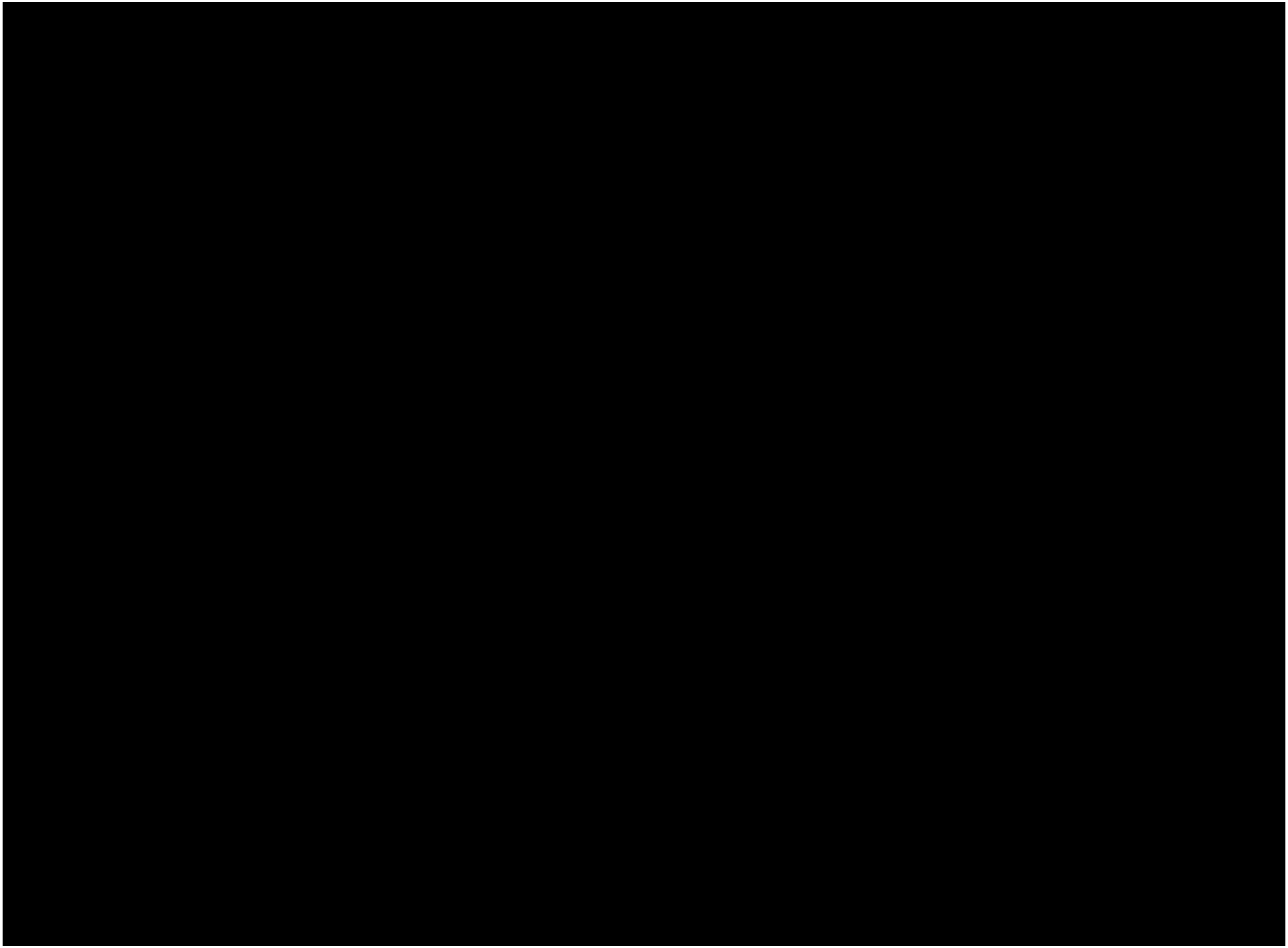
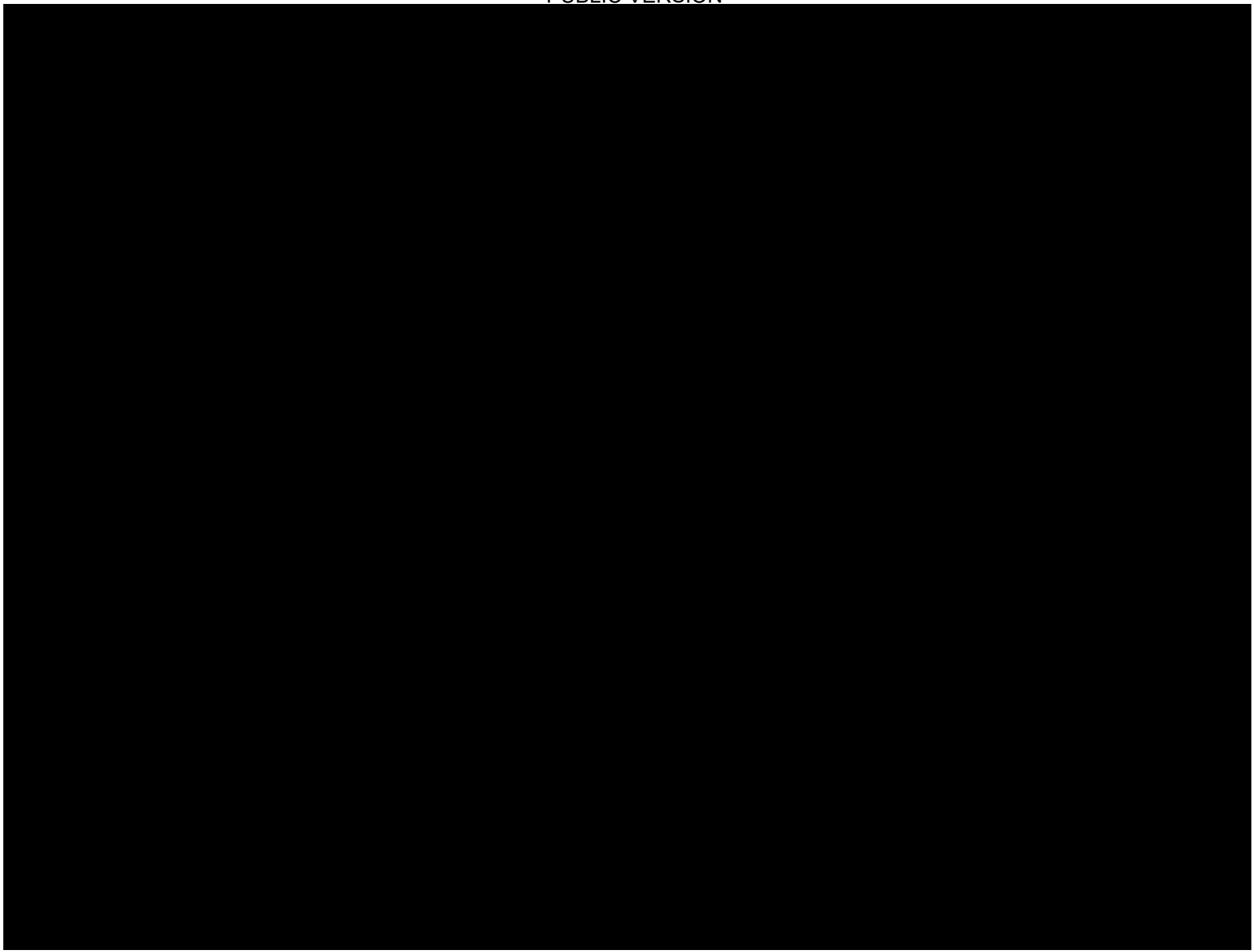
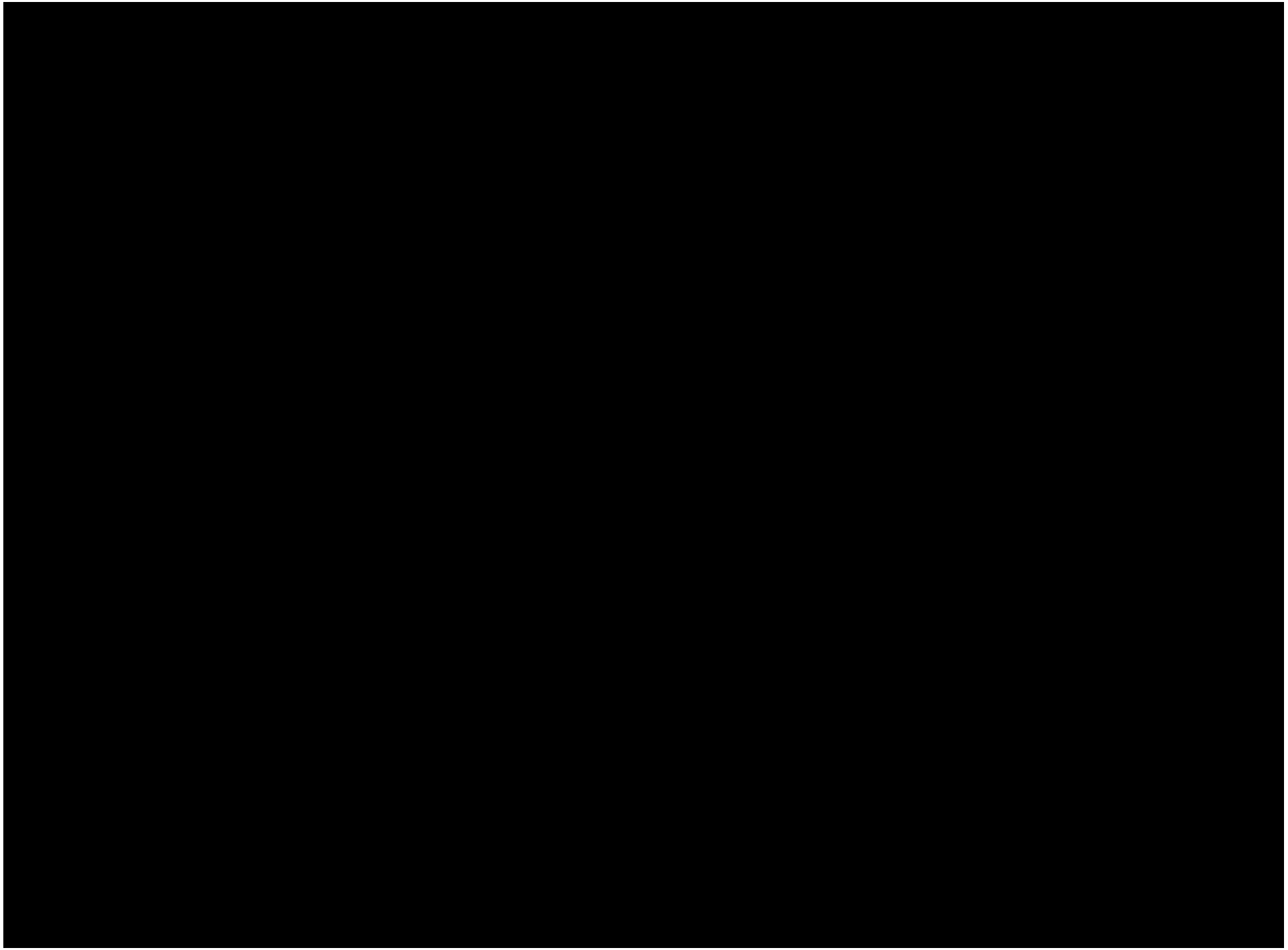
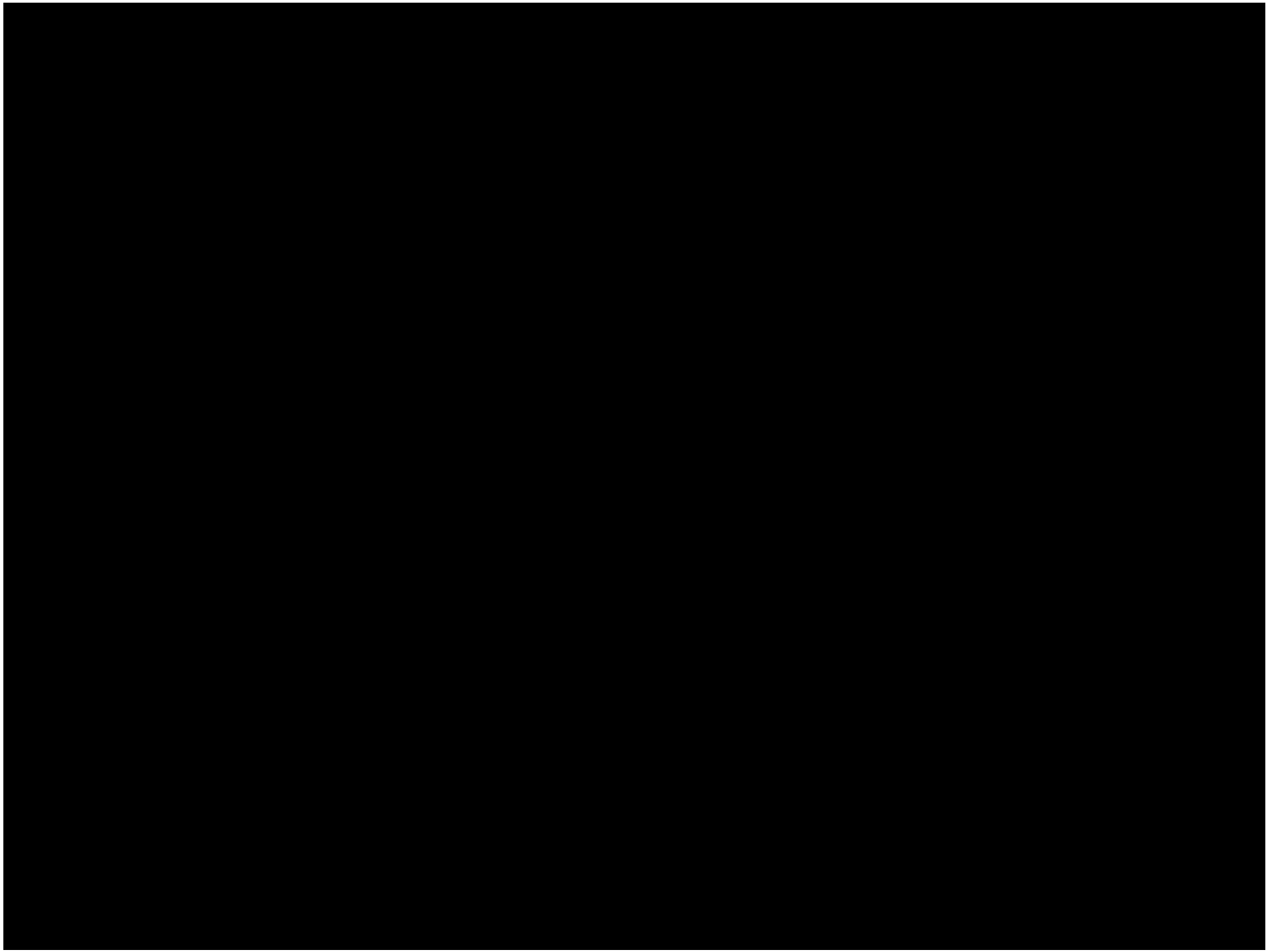


Exhibit D-3







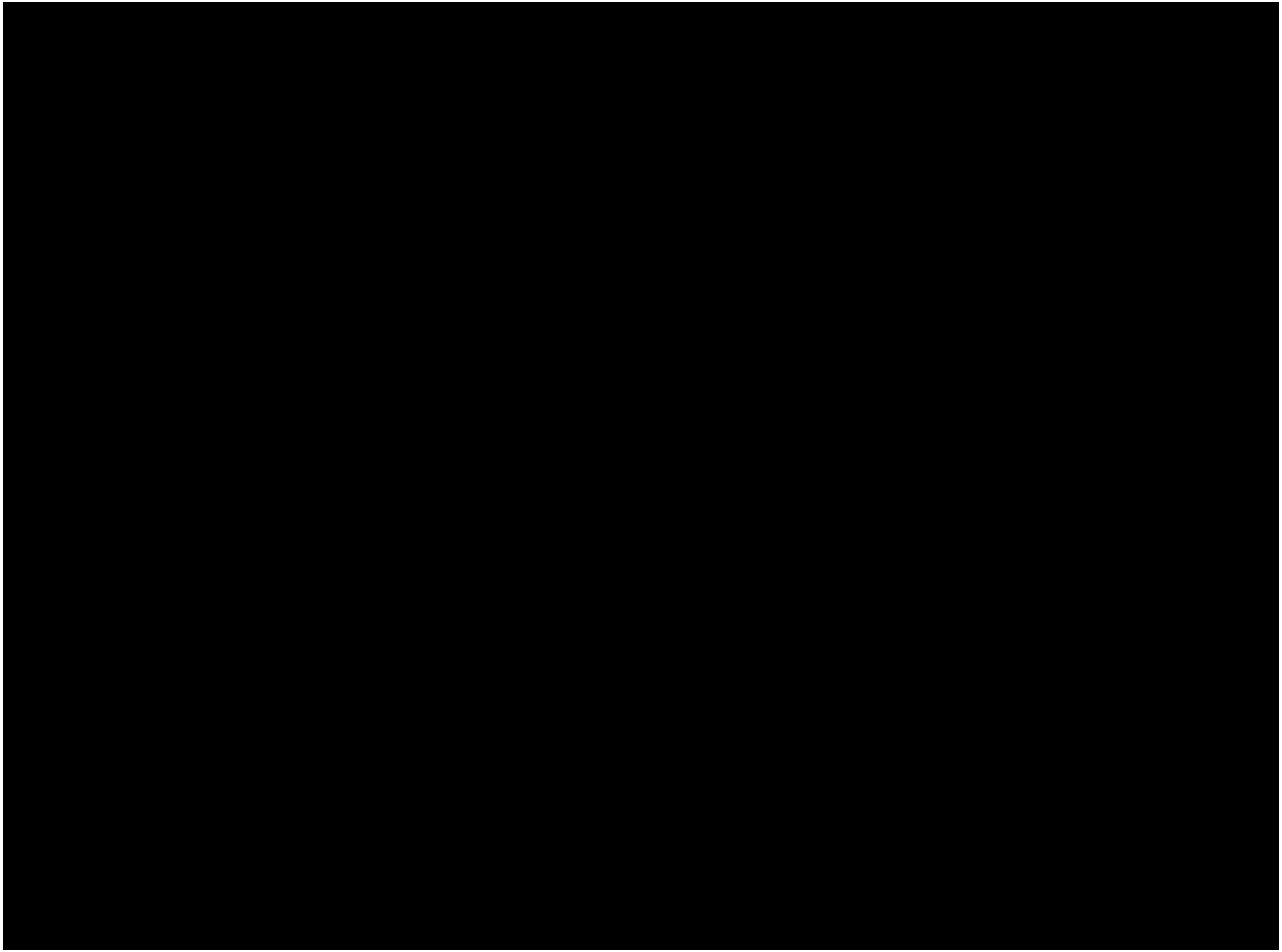
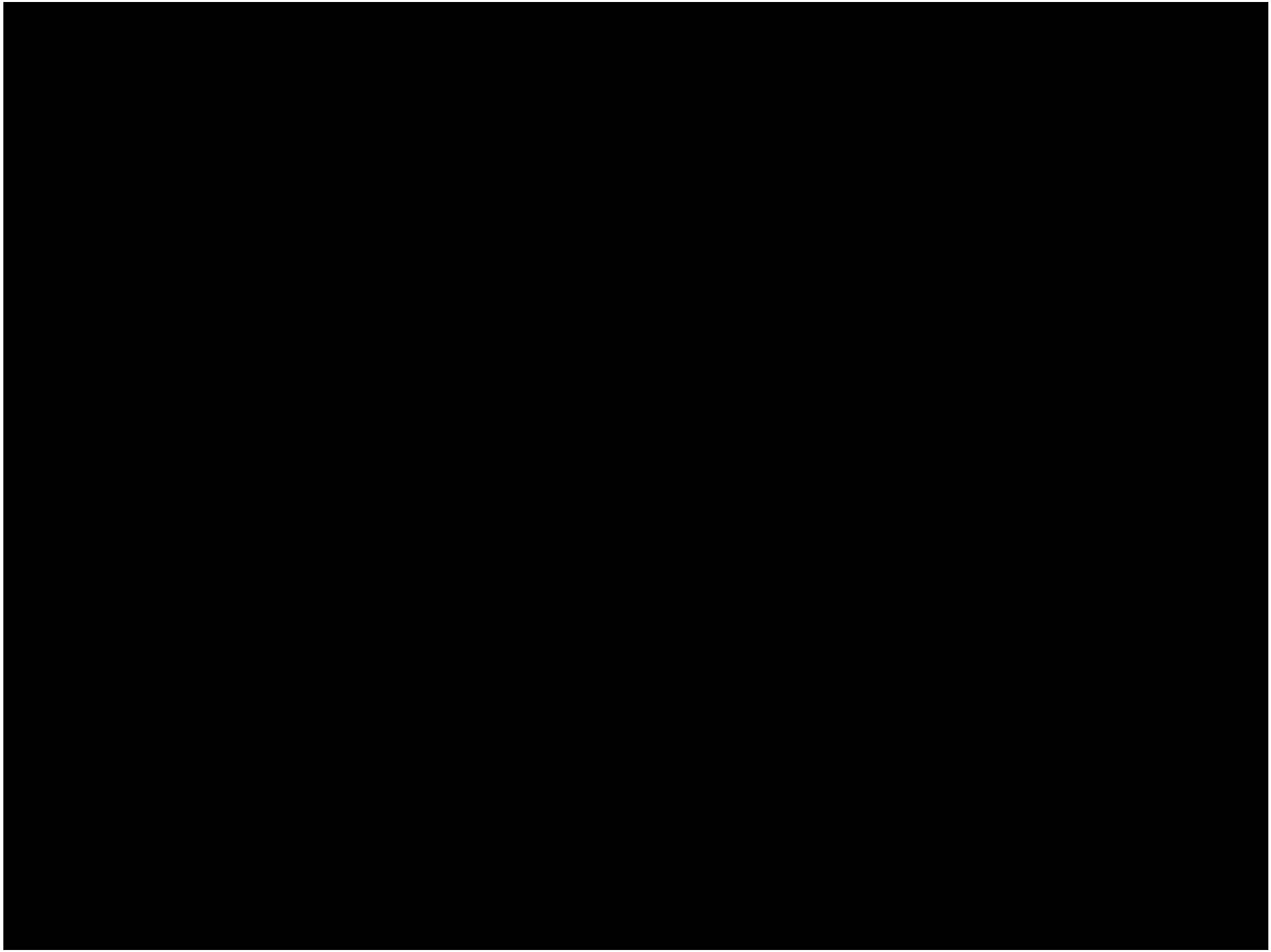
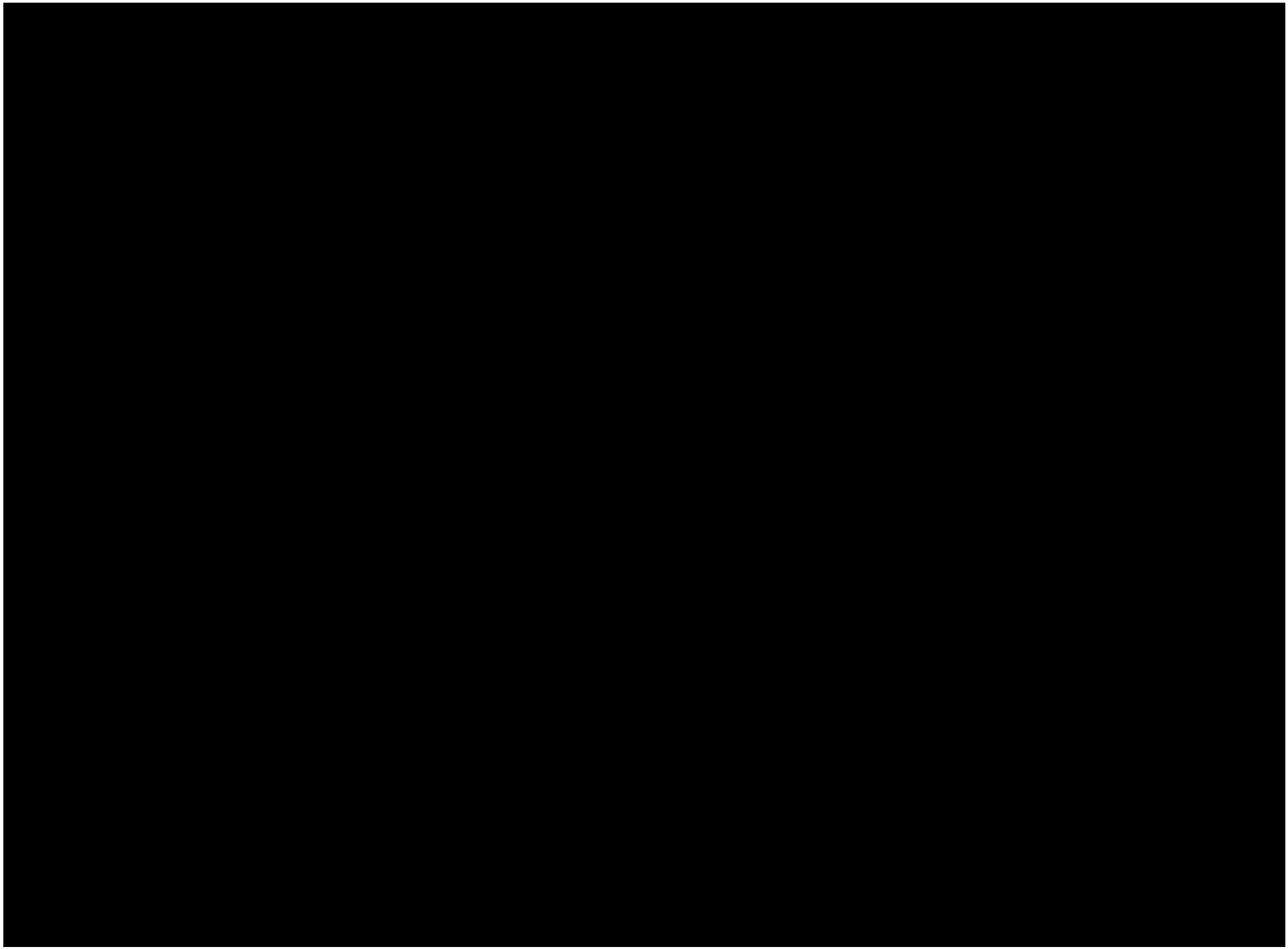
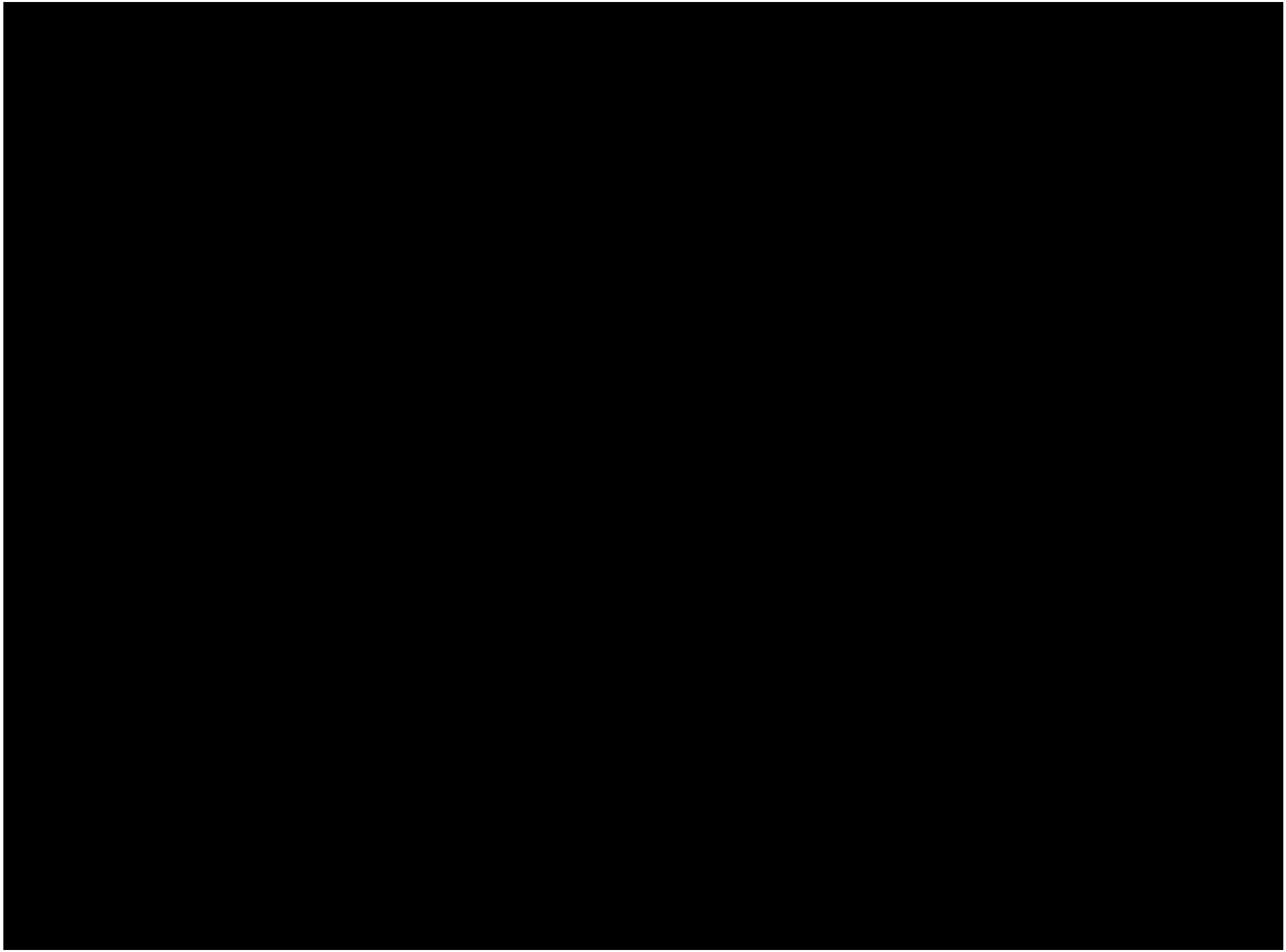
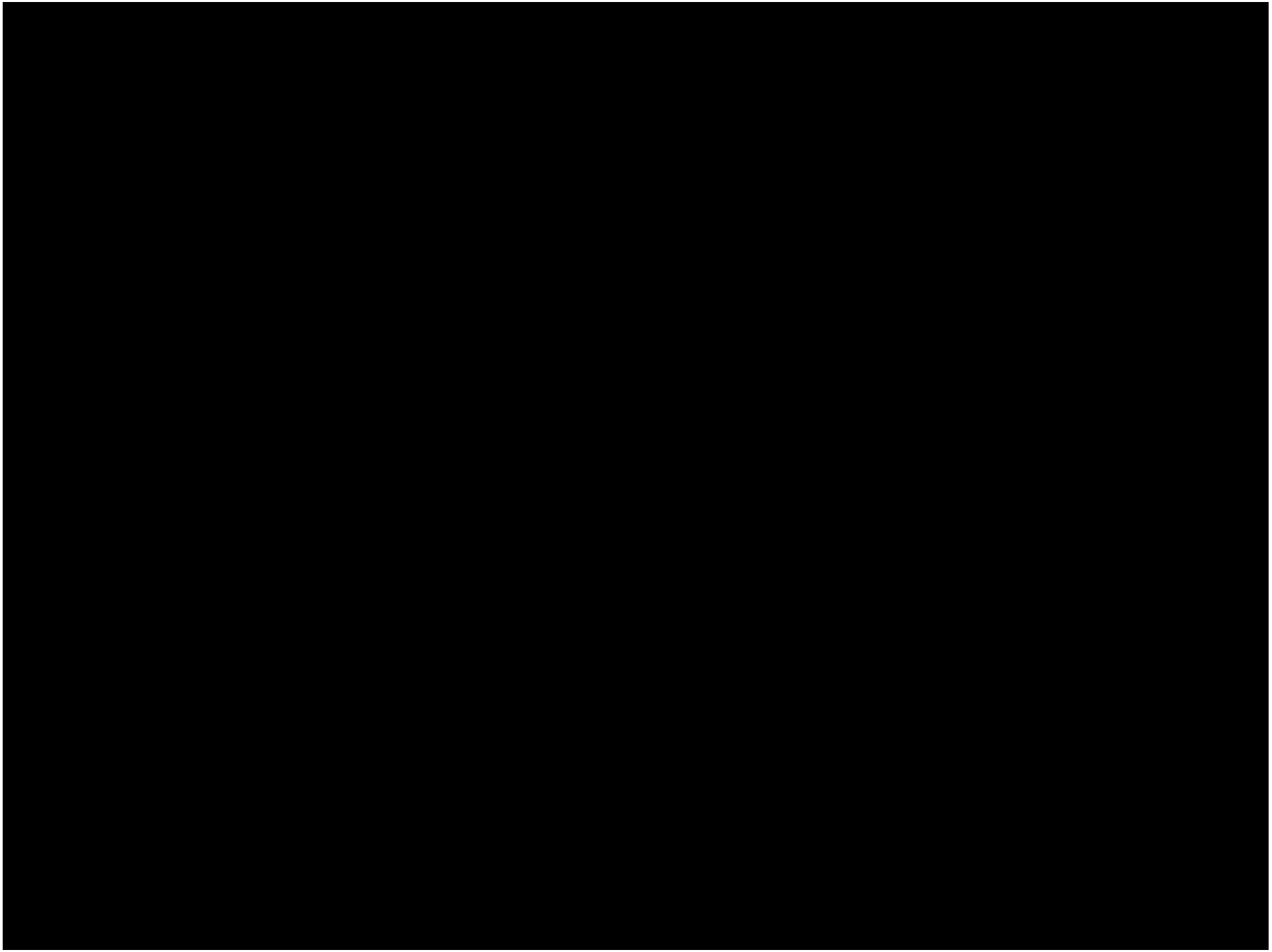


Exhibit D-4









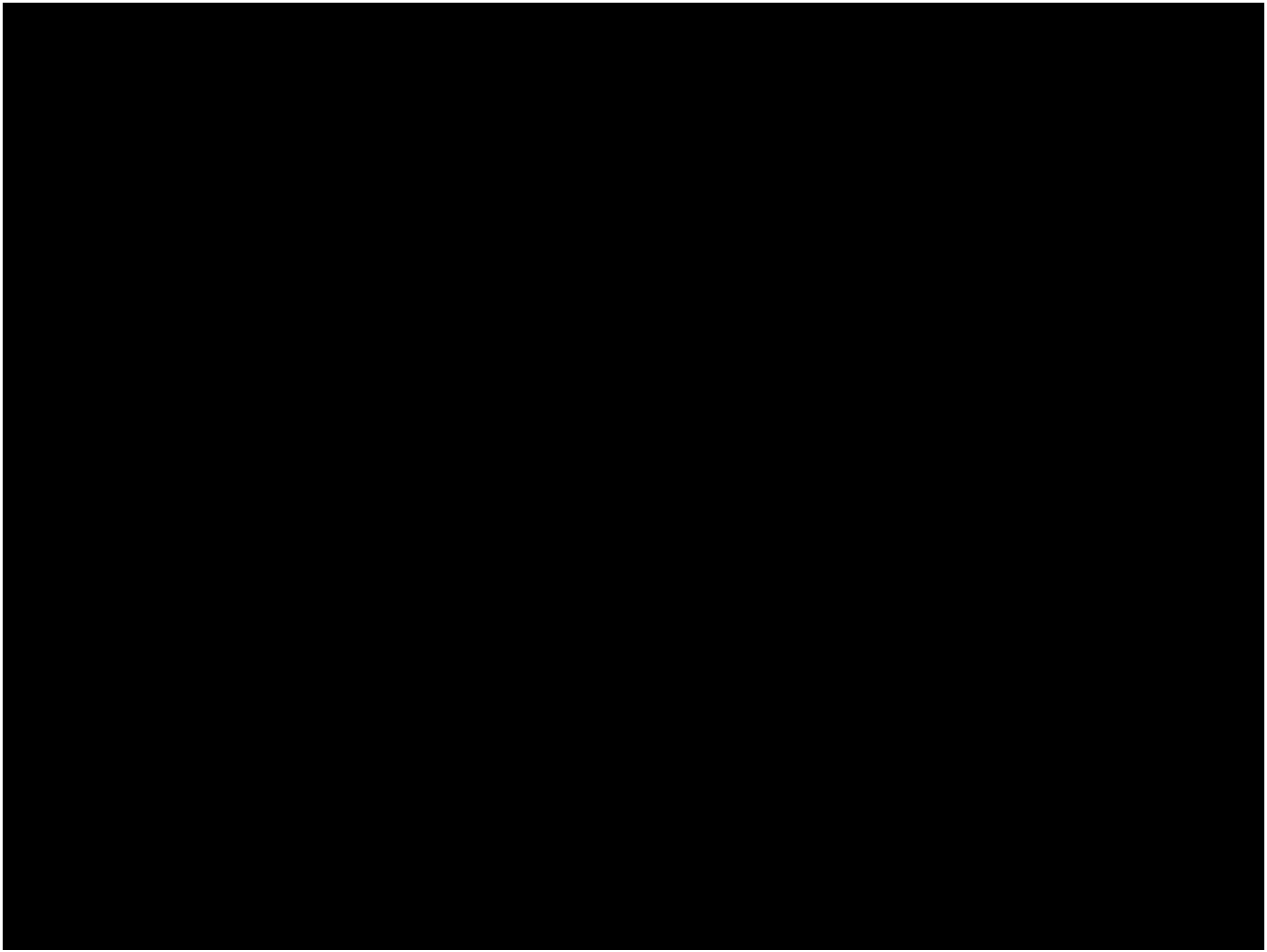


Exhibit E

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA, Complainant, v. ALABAMA POWER COMPANY, Defendant.	Proceeding No. 19-119 Bureau ID No. EB-19-MD-002

REPLY DECLARATION OF CHRISTIAN M. DIPPON, PH.D.
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

I, Christian M. Dippon, Ph.D., hereby declare:

1. My name is Christian M. Dippon. My business address is 1255 23rd Street, Suite 600, Washington, DC 20037. I am a Managing Director at the Washington, DC, office of NERA Economic Consulting (NERA) where I also serve as Chair of the Global Energy, Environment, Communications & Infrastructure (EECI) practice. I submitted an Initial Affidavit in this matter that includes my qualifications at Exhibit D-1.[1]

2. I prepared this Reply Declaration[2] at the request of counsel for Complainant BellSouth Telecommunications, LLC d/b/a AT&T Alabama (AT&T). Counsel requested that I review the June 21, 2019 Answer filed by Alabama Power Company (Alabama Power) and

[1] See Affidavit of Christian M. Dippon, Ph.D. in Support of Pole Attachment Complaint, *BellSouth Telecommunications, LLC d/b/a/ AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002, dated April 16. 2019 (hereinafter Dippon Initial Aff.).

[2] I am submitting a Declaration in lieu of an Affidavit due to international travel.

respond to arguments made by Alabama Power, including those contained in the affidavit of Kenneth P. Metcalfe (The Hendrik Group LLC) and declaration of Wilfred Arnett (TRC Solutions), and those that pertain to my Initial Affidavit.[3]

3. My review of Alabama Power's Answer confirms and reinforces the conclusions I reached in my Initial Affidavit: the pole attachment rates that Alabama Power has been charging AT&T under the parties' 1978 Joint Use Agreement, as amended in 1994 (JUA), are not just and reasonable and not competitively neutral, but reflect Alabama Power's longstanding and ongoing abuse of its position as owner of a large majority of the utility poles jointly used by the parties. I continue to recommend that the Federal Communications Commission (FCC) set the just and reasonable rate for AT&T's use of Alabama Power's poles at the properly calculated per pole new telecom rate because Alabama Power has not identified anything that individually or collectively provides AT&T a net material competitive benefit that warrants a deviation from the applicable FCC new telecom rate standard.

4. As support for my conclusions, I explain that Alabama Power advocates for a rate structure that the FCC has been trying to eliminate and for rate formula inputs that the FCC has found unlawful when applied to AT&T's competitors. I also detail why Alabama Power's attempted defense of the JUA rates—specifically, that replicating Alabama Power's pole

[3] See Alabama Power Company's Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, *BellSouth Telecommunications, LLC d/b/a/ AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002, dated June 21, 2019 (hereinafter Alabama Power Answer); see also Alabama Power Answer, Ex. D, Affidavit of Kenneth P. Metcalfe, *BellSouth Telecommunications, LLC d/b/a/ AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002, dated June 20, 2019 (hereinafter Metcalfe Aff.); Alabama Power Answer, Ex. E, Declaration of Wilfred Arnett On Behalf of Alabama Power Company, *BellSouth Telecommunications, LLC d/b/a/ AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002, dated June 19, 2019 (hereinafter Arnett Decl.).

network would be more expensive—evidences Alabama Power's continued exercise of market power and is at odds with the objectives of two recent FCC orders that mandate just, reasonable, and competitively neutral rates. I also rebut the valuations and arguments presented by Mr. Metcalfe and Mr. Arnett and explain why they do not establish that AT&T has a net material advantage over its competitors. Finally, I respond to Alabama Power's criticism of my Initial Affidavit.

5. As before, AT&T retained me as an independent expert in this matter. As such, neither my compensation nor my firm's compensation is dependent in any way on the substance of my opinions or the outcome of this matter. I may revise and supplement my opinions upon further review and analysis of any new data, materials, analysis, or pleadings.

I. ALABAMA POWER ADVOCATES FOR THE VERY RATE STRUCTURE THE FCC HAS BEEN TRYING TO ELIMINATE

6. As explained in my Initial Affidavit, the present dispute is about what constitutes a just and reasonable pole attachment rate for AT&T's use of Alabama Power's poles that is also competitively neutral. I highlighted that two FCC orders "offer specific guidance on this topic."[4] These orders—specifically, the 2011 *Pole Attachment Order*[5] and the 2018 *Third Report and Order*[6]—make it clear that Alabama Power must charge AT&T the same annual attachment rate that applies to competitive local exchange carriers (CLECs) under the FCC's new telecom

[4] Dippon Initial Aff., ¶ 12.

[5] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (hereinafter *Pole Attachment Order*).

[6] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 14 FCC Rcd 18049 (2018) (hereinafter *Third Report and Order*).

formula ($8.35 per pole for the 2017 rental year),[7] *unless* Alabama Power can definitively demonstrate that the JUA would give AT&T a net material competitive advantage over its cable television (CATV) and CLEC rivals if charged that rate.[8] However, Alabama Power may not charge AT&T more than $12.66 per pole (for the 2017 rental year), which is the rate that results from the application of the FCC's preexisting telecom formula.[9] The FCC's guidance significantly simplifies the present matter because (using the 2017 rental year as an example) it establishes that $8.35 per pole is the rate that Alabama Power may lawfully charge AT&T, requires Alabama Power to demonstrate whether, if at all, it may lawfully charge a higher rate, and sets a $12.66 per pole upper bound on the range of potential just and reasonable rates.

7. Alabama Power's Answer ignores the FCC's guidelines and instead pursues a mix of theories—none of which makes economic sense or addresses the topics already considered and ruled upon by the FCC. Moreover, Alabama Power unnecessarily complicates the matter in an apparent effort to obscure the fact that its defense of the JUA depends entirely on a departure from settled ratemaking and competitive neutrality principles.

A. Alabama Power Wants To Retain the Status Quo and Ignore All ILEC Rate Reforms Issued by the FCC Since 2011

8. Alabama Power's Answer reflects an effort to try to preserve the current rental rates by presenting any conceivable argument, regardless of whether it makes sense, is consistent with other theories, or is grounded in fact. Under one theory, Alabama Power argues that AT&T actually or "constructively" occupies [redacted] feet of space, [redacted] feet of space, [redacted] feet of space, and

[7] See Affidavit of Daniel P. Rhinehart in Support of Pole Attachment Complaint, Apr. 16, 2019, ¶ 13 (hereinafter Rhinehart Aff.).

[8] See *Pole Attachment Order* ¶¶ 217–218.

[9] As measured in 2017. (Ibid, ¶ 218; see also Rhinehart Aff., ¶ 19).

[redacted] feet of space on a pole—without supporting any of these values with survey data that actually measured AT&T's space across the joint use network or explaining the existence of this wide range of space that is allegedly occupied by AT&T.[10] Under another theory, Alabama Power argues that AT&T should pay rental rates that cover additional space on Alabama Power's poles plus the cost of an entire replacement network of poles (which, of course, would mean that AT&T would not occupy any space on Alabama Power's poles).[11] The only commonality in Alabama Power's conflicting theories is its ability to manipulate data and contrive absurd hypotheticals to produce rental rates that exceed the [redacted] per pole rate that Alabama Power charged AT&T for the 2017 rental year. This, Alabama Power reasons, is enough to establish that the [redacted] per pole rate is just and reasonable and competitively neutral. There are at least three fundamental errors in Alabama Power's argumentation.

9. First, not one of Alabama Power's theories replicates the rate that Alabama Power charges AT&T. Under its "constructive" space theory, it selects the highest space number ([redacted] feet) to claim the 2017 rate should be [redacted] per pole.[12] Under its replacement cost theory, it appears to add its unsupported values for multiple replacement networks to claim AT&T's rate should be as high as [redacted] per pole.[13] Of course, the JUA rates are not based on these theories. Instead, Alabama Power's arguments are afterthoughts invented to try to make its excessive JUA rates appear less out-of-line. All this, however, cannot establish that the JUA rates Alabama Power charges AT&T are, in fact, just, reasonable, and competitively neutral. The [redacted] per

[10] See Alabama Power Answer, ¶¶ 12, 18.

[11] See Metcalfe Aff., ¶¶ 23, 27, 28, 31.

[12] See Alabama Power Answer, ¶ 12.

[13] See Metcalfe Aff., Ex. D-1 (apparently adding [redacted] per-pole amounts).

pole rate that Alabama Power charges AT&T is still nearly [redacted] the average $26.12 per-pole rate that, in part, led the Commission to adopt the new telecom rate presumption in order to accelerate rate relief to ILECs.[14]

10. Second, Alabama Power does not advocate for a single rate that falls within the range of new and preexisting telecom rates set by the FCC.[15] Indeed, Alabama Power so manipulates the FCC rate formulas to try to support its argument that Alabama Power asserts new telecom rental rates that are [redacted] times the pre-existing telecom rates it calculates for the same amount of space occupied,[16] even though properly calculated new telecom rates in Alabama Power's service area are 0.66 times the pre-existing telecom rate using the FCC's presumptive inputs.[17]

11. Third, Alabama Power admits that the rates it charges AT&T—and the rates it calculates under its various theories—are not competitively neutral, even accounting for the fact that Alabama Power admits that it has "modified … the FCC's rate formulas" when charging CLEC and CATV attachers.[18] Even with these modifications, which improperly increase the resulting rental rates, Alabama Power charged a [redacted] new telecom rate and a [redacted] cable rate

[14] See *Third Report and Order* ¶ 125.

[15] As calculated by Mr. Rhinehart, the new and preexisting telecom rates for AT&T's use of Alabama Power's poles were $8.35 per pole and $12.66 per pole, respectively, for the 2017 rental year. (See Rhinehart Aff., ¶¶ 14, 19.)

[16] See Alabama Power Answer, ¶ 12 (claiming [redacted] per pole new telecom rate for 2017); Alabama Power Answer, ¶ 26 (claiming [redacted] per pole pre-existing telecom rate for 2017).

[17] See 47 C.F.R. § 1.1406(d)(2).

[18] Alabama Power Answer, Ex. B, Declaration of Wesley L. Conwell, Jr. ¶ 5, *BellSouth Telecommunications, LLC d/b/a/ AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002, dated June 20, 2019 (hereinafter Conwell Decl.).

for the 2017 rental year, significantly less than the [redacted] per pole JUA rate that AT&T paid and every other rate Alabama Power's derived under its various theories.[19]

12. Alabama Power attempts to retain the *status quo*. In doing so, Alabama Power ignores every ILEC rate reform adopted by the FCC since 2011 and tries to justify charging rates that will continue to cause the distorting economic effects the FCC has tried to eliminate. The Commission has rightly recognized that excessive rates, like those charged by Alabama Power, discourage network rollouts, network upgrades, and other investments, provide a competitive advantage to CLEC and CATV providers, and overcompensate the power companies. Alabama Power's various theories do not provide a valid economic basis to turn back the clock on the FCC's reforms.

B. Alabama Power's Calculation of Space Occupied Is Incorrect

13. In its attempt to justify its rates, Alabama Power ignores more than the Commission's ILEC rate reforms. It also ignores the Commission's ruling that just and reasonable and competitively neutral rental rates shall be calculated based on the space that the attacher occupies on a utility pole.[20]

14. Under one of Alabama Power's theories, it argues that the new telecom rates charged to AT&T should be [redacted] the new telecom rates it actually charged AT&T's competitors.[21] Alabama Power did not provide any data used to derive this number, except to state that it asked a contractor to review data provided in connection with 4,303 pole attachment

[19] Alabama Power Answer, ¶ 12; see also Conwell Decl. ¶¶ 5, 8.

[20] See 47 C.F.R. § 1.1406(d).

[21] See Alabama Power Answer, ¶ 12; see also Conwell Decl. 10.

applications.[22] It claims that the applications for these unidentified poles, which reflect 0.70% of the 615,554 Alabama Power poles to which AT&T is attached, show that the average space between AT&T's highest attachment *on the utility pole* and the lowest point of its cable *between utility poles* (measured from the ground) is [redacted] feet. Alabama Power then adds the 3.33 feet of safety space that is required because of the nature of Alabama Power's facilities. Adding these two values results in [redacted] feet of space, which Alabama Power "round[s] down to [redacted] feet."[23]

15. There are several errors in this argumentation. First, Alabama Power's multiplication of new telecom rates by the number of feet violates the Commission's rules, which include rate formulas that "determine the maximum just and reasonable rate *per pole*."[24] The formulas include a "space occupied" input, which is presumptively populated with a 1 foot value for communications attachers and can be adjusted if a statistically valid survey data establishes that an attacher occupies more space, on average, across a pole network.[25] This ensures that the unusable space on the pole is proportionally shared among *attaching entities*.[26]

16. Second, Alabama Power's attempt to assign AT&T the safety space violates competitive neutrality because, by Alabama Power's own admission, it cannot lawfully charge

[22] Alabama Power Answer, Ex. C, Declaration of Sherri T. Morgan ¶ 7, *BellSouth Telecommunications, LLC d/b/a/ AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002, dated June 20, 2019 (hereinafter Morgan Decl.).

[23] See Alabama Power Answer, ¶ 40.

[24] See *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 31 (2001) (hereinafter *Consolidated Partial Order*) (emphasis added).

[25] See 47 C.F.R. §§ 1.1406(d); 1.1410.

[26] See 47 U.S.C. § 224(e)(2).

AT&T's competitors for that space.[27] The FCC found that the "safety space …. is usable and used by the electric utility,"[28] and that does not change when AT&T is attached to the pole. Indeed, AT&T's facilities are often not located next to the safety space.[29] It is located between Alabama Power's lowest attachment and the highest communications attachment, which is often the attachment of a CLEC or CATV attacher and not AT&T.[30]

17. Third, the Commission has rejected requests to consider mid-span sag located *off the pole* when calculating space occupied *on the pole*. For example, the Commission held that an overlashed facility should be presumed to occupy one foot of space on the pole even if the added weight from the overlashing could result in increased pole loading and sag.[31] There is no valid economic reason to treat AT&T's facilities differently.

18. Fourth, all aerial cables are subject to sag, including cables for Alabama Power, CATV, and CLEC attachers, but Alabama Power seeks to only charge AT&T for sag. Alabama Power's pole license agreements with AT&T's competitors state that the company uses one foot as the "space occupied" input for its rate calculations.[32] Charging AT&T differently would violate principles of competitive neutrality.

19. Fifth, Alabama Power's "sag theory," if applied to all communications attachers, would let Alabama Power significantly over-recover. Under Alabama Power's theory, space that

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[27] See Alabama Power Answer, ¶ 12 n.39.

[28] *Consolidated Partial Order* ¶ 51.

[29] See Miller Reply Aff. ¶ 19.

[30] See ibid.

[31] *Consolidated Partial Order* ¶¶ 77-78.

[32] See Pole License Agreement by and between _____ and Alabama Power Company, attached to Sherri I. Morgan (Southern Co.) email to Kyle F. Hitchcock (AT&T), subject: Joint Use Agreement between Alabama Power Company and AT&T, attaching Model CLEC Agreement.docx, June 15, 2018, Exhibit A-2 (hereinafter Model CLEC Agreement).

is not "occupied" *on the pole* is nonetheless "occupied" *between poles*. This, in turn, could let Alabama Power double recover for the same segment of pole space—once from the attacher whose attachment is occupying the space on the pole, and again from another attacher whose attachment is on the same plane mid-span.

20. Finally, there is agreement that pole attachment rates are set based on measurements on the pole—and not yards away. The JUA reflects this understanding. Its pole allocation schematic at Appendix B includes horizontal lines when depicting the space allocated to the parties, without reference to sag. The same was true for prior versions of Appendix B.[33] Alabama Power's Joint Use Team Leader, Ms. Morgan, also provides a depiction of measurements taken (at least for all attachers but AT&T) on the pole.[34] Her image further illustrates that AT&T's and its competitors' facilities require a comparable amount of space when measured on the pole.[35] Alabama Power's outside accountant, Mr. Metcalfe, also understands that the space occupied for rate setting is physical space on the pole, as he refers to "the amount of 'usable' space reserved for each party *on a … pole.*"[36]

21. Competitive neutrality thus demands that rates for AT&T treat the "space occupied" input to the new telecom formula in the same manner that it is treated for all communications attachers—based on a presumption that AT&T occupies, on average, one foot of space. Space, therefore, does not give Alabama Power an economic basis to charge, or

[33] See JUA, 1984 Appendix B (APC000332-345 at 342); see also JUA, 1990 Appendix B (APC000347-350 at 350).

[34] Morgan Decl., Ex. C-1.

[35] Ibid.

[36] Metcalfe Aff., ¶ 7 (emphasis added).

continue charging, AT&T rates up to [redacted] times the per pole rates that apply to AT&T's CLEC and CATV competitors under the FCC's rate formulae.

II. ALABAMA POWER CONFIRMED THAT ITS RATES EVIDENCE ITS POLE OWNERSHIP ADVANTAGE

22. In my Initial Affidavit, I explained that Alabama Power has been able to impose and continue charging unreasonably high rental rates over the course of the JUA because of the bargaining power it enjoys by virtue of the significant disparity in pole ownership between Alabama Power and AT&T. The analysis performed by Alabama Power's outside accountant, Mr. Metcalfe, exemplifies Alabama Power's disregard of the FCC's competitive concerns and its intention to use its pole ownership advantage to continue charging the uncompetitively high JUA rates.

23. The essence of Mr. Metcalfe's argumentation is that Alabama Power's pole attachment rates are just and reasonable because they are significantly lower than what AT&T would pay if it had to furnish and install the poles to replace the Alabama Power poles to which it currently attaches. Specifically, Mr. Metcalfe argues that but for the JUA, AT&T would need to pay [redacted] per pole in perpetuity, calculated by adding [redacted] per pole in contingency costs (storage costs incurred to be ready to build-out a network) and [redacted] per pole in installation costs.[37] Mr. Metcalfe acknowledges that Alabama Power would also need to furnish and install additional poles without the JUA because it attaches to 179,021 AT&T poles. After providing an offset to account for these poles, Mr. Metcalfe concludes that AT&T would still need to pay [redacted] per pole in perpetuity without the JUA, and Alabama Power would pay nothing.[38] Mr.

[37] See Metcalfe Aff., ¶¶ 19, 23.

[38] Ibid. (calculating annualized net amount as [redacted] per pole in contingency costs and [redacted] per pole in installation costs, for a total of [redacted] per pole).

Metcalfe concludes, "AT&T therefore receives a unique and fundamental benefit as a result of the JUA…."[39]

24. Before addressing the many conceptual errors contained in Mr. Metcalfe's calculations, it is important to examine his argumentation because it makes the very point that I made in my Initial Affidavit. It proves that Alabama Power has superior bargaining power over AT&T. Mr. Metcalfe opines that it was just and reasonable for Alabama Power to charge AT&T [redacted] per pole for 2017 rent because it was lower (significantly so) than AT&T's next best alternative of placing its own poles, which would have cost the Company [redacted] per pole. But Mr. Metcalfe's calculation establishes neither the justness nor the reasonableness of the attachment rate, let alone its competitive neutrality.

25. A just and reasonable rate obtained through commercial negotiations requires that the parties be equal partners and that they possess relatively equal bargaining power such that the resulting price is independent of their relative bargaining positions. Mr. Metcalfe, however, demonstrates that AT&T would stand to lose far more than Alabama Power would lose absent joint use. Even under his highly flawed calculations, he values this difference at [redacted] per pole—the amount AT&T would have to pay to Alabama Power under his analysis, equal to more than [redacted] every year in perpetuity.[40] This monetary difference establishes that Alabama Power has substantial market power "when granting access to its pole infrastructure under the essential facilities doctrine…."[41] Mr. Metcalfe thus confuses the concept of just and reasonable rates (which is independent of a party's bargaining position) with a bargaining situation where

[39] Ibid, ¶ 17.

[40] Metcalfe Aff., Ex. D-1 (calculating annualized net amount as [redacted] in contingency costs and [redacted] in installation costs, for a total of [redacted]).

[41] Dippon Initial Aff., ¶ 18.

one party (Alabama Power) previously had and currently has far less to lose than the other party (AT&T). Under such circumstances, the dominant party can use its leverage to obtain its desired result.

26. Not surprisingly, because of his confusion between rates resulting from unequal bargaining power versus rates that are just and reasonable, Mr. Metcalfe's affidavit makes no mention of competitive neutrality. If Alabama Power bases CLEC and CATV attacher rates on the FCC's new telecom formula and AT&T's rates on the cost of placing its own poles, it is impossible to achieve competitive neutrality.

III. ALABAMA POWER DOES NOT IDENTIFY ANY NET MATERIAL BENEFIT THAT JUSTIFIES CHARGING AT&T A RATE HIGHER THAN THE NEW TELECOM RATE

27. Alabama Power claims it rebutted the presumption that AT&T should be charged a new telecom rate with "the analysis of Mr. Wilfred Arnett and the economic evaluation submitted by Mr. Kenneth Metcalfe."[42] I disagree.

A. Mr. Metcalfe Did Not Identify a Net Material Competitive Benefit

28. Mr. Metcalfe provides calculations that focus on three theories that he may, or may not, see as additive: first, that AT&T receives, as the "benefit of the bargain," a right to remain attached to existing Alabama Power poles after the JUA terminates that should be valued based on the cost of a replacement network (which consists of two components); second, that AT&T purportedly avoided make-ready and other costs when it attached to Alabama Power's poles that should be valued based on the cost of replacing Alabama Power's poles with taller poles; and third, that AT&T has derived a benefit from safety space on Alabama Power's poles,

[42] Alabama Power Answer, ¶ 13.

unused "mid-span sag", and certain other alleged but unquantified benefits. Each theory is fatally flawed.

1. Mr. Metcalfe's Benefit Of The Bargain Theory Is Wrong

29. There are several conceptual and factual errors in Mr. Metcalfe's accounting exercise. First, the entire exercise is irrelevant because what Mr. Metcalfe attempts to measure does not provide AT&T with a net *competitive* benefit.[43] Under this theory, Mr. Metcalfe attempts to quantity the value of a perpetual license because, as Mr. Metcalfe understands the JUA, Alabama Power cannot require AT&T to remove its attachments on *existing* JUA poles if the JUA terminates; it can only prevent it from attaching to *new* poles (i.e., poles to which AT&T does not yet attach). But per Mr. Metcalfe's own finding, "Alabama Power is required… to provide mandatory access to CLECs and CATVs but is not required to provide mandatory access to AT&T, which is an ILEC."[44] And he notes that this is a material *disadvantage* for AT&T. Yet in his calculation, Mr. Metcalfe entirely ignores the fact that CLEC and CATV attachers have access rights to *all* poles, *existing and new*, at all times. As stated by the FCC:

> The Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility.[45]

Thus, if anything, the JUA improves (but does not eliminate) the material disadvantage that Mr. Metcalfe acknowledges and thus provides no net advantage to AT&T over CLEC and CATV

[43] Alabama Power's Answer incorrectly claims that I offered no economic analysis about the alleged benefits Alabama Power claims AT&T receives. See Alabama Power Answer, ¶ 42 fn. 171. However, paragraphs 32–41 of my Initial Affidavit include this analysis.

[44] Metcalfe Aff., ¶ 9.

[45] *Pole Attachment Order*, ¶ 10 (footnotes omitted).

attachers. Seemingly aware of the contradiction in his own statement, Mr. Metcalfe claims that by contract, "Alabama Power is not precluded from terminating an agreement with a CLEC or CATV and subsequently requiring the CLEC or CATV to remove their attachment from Alabama Power's poles."[46] But regardless of what the sample CLEC agreement he cites for this point says, he admits that the law provides otherwise. Thus, Mr. Metcalfe's "benefit of the bargain" theory calculation is meaningless because the so-called "perpetual license" or "evergreen" provision in the JUA provides no net competitive benefit to AT&T.

30. Second, Mr. Metcalfe's "benefit of the bargain" theory calculation is unsupported, convoluted, hypothetical, and an entirely unrealistic accounting exercise. Mr. Metcalfe has no documentation for any of his data and simply cites "discussions with Mr. Powell" and Ms. Morgan as his support.[47] Mr. Powell did not submit a declaration or affidavit, provided no support for the guess that AT&T would incur [redacted] million in inventory costs absent the JUA, or otherwise explain how he could know how to source 630,000 poles and store them, when such an undertaking has likely never occurred.[48] Ms. Morgan did file a declaration, but did not discuss the derivation of the values that she apparently provided Mr. Metcalfe. Mr. Metcalfe nonetheless entirely relies on an *understanding* that Ms. Morgan used a pricing tool internal to Alabama Power to determine that it would cost [redacted] million in system replacement costs to hire a crew of 10,000 to install 630,000 poles.[49]

31. The entire exercise is absurd. It's highly unlikely that Alabama Power ever purchased, stored, and installed 630,000 poles all *at one time*. Moreover, the entire accounting

[46] Metcalfe Aff., ¶ 24.

[47] Ibid, ¶¶ 19 fn. 23, 23 fn. 30.

[48] Ibid, ¶ 19.

[49] Ibid, ¶ 23.

exercise—which consists of Mr. Metcalfe taking unsupported numbers from two individuals (Mr. Powell or Ms. Morgan) and annualizing them—is meaningless. As I stated previously, duplicating Alabama Power's pole network is "neither economically feasible nor socially desirable."[50] Hence, quantifying the cost of a dystopian world in which there are two poles placed next to each other at every location adds no value to this matter.

2. Mr. Metcalfe's Inspection, Permitting, and Make-Ready Cost Calculations Are Incorrect

32. Mr. Metcalfe engages in a similar hypothetical accounting exercise when calculating the purported benefits AT&T receives from allegedly avoiding inspection, permitting, and make-ready costs. There are several errors with Mr. Metcalfe's claim that there is value to these items that accrues to AT&T, but not to other attachers.

33. First, Mr. Metcalfe states, "AT&T… does not pay inspection or permitting costs when attaching to a JUA pole."[51] Mr. Metcalfe provides no support for this other than stating that he received this information from "discussions with Ms. Morgan."[52] Ms. Morgan, in her declaration, only states that she has never *seen* AT&T perform an inspection.[53] It is my understanding that AT&T does, in fact, incur these costs because it completes all engineering and paperwork required in order to attach and then inspects the pole before and after an

[50] Dippon Initial Aff., ¶ 18.

[51] Metcalfe Aff., ¶ 25.

[52] Ibid, fn. 35.

[53] Ms. Morgan states, "In all of my years with Alabama Power, many of which were spent in the field, I have never seen AT&T performing a survey or inspection of any sort. The only thing I ever see AT&T doing in the field is construction or repair of their lines." (Morgan Decl., ¶ 19.)

attachment is made.[54] Hence, AT&T incurs inspection and permitting costs through its internal cost structure and therefore enjoys no net benefit over its competitors. Indeed, Mr. Metcalfe did not even establish that AT&T's competitors in fact pay these permitting and inspection fees, some of which are described as *optional*.[55]

34. Second, Mr. Metcalfe's make-ready claim is premised entirely on a claim that Alabama Power built 40-foot poles because of the JUA, and those poles allowed AT&T to avoid make-ready costs. The premise of this argument is contradicted by the evidence. The JUA shows both that 40-foot poles were not required by the JUA, and that 40-foot poles were regularly installed *before* the JUA took effect. The JUA states that 35-foot poles are permitted,[56] and between 1979 and 1983, 23% of the joint use poles installed by Alabama Power were 35-foot poles.[57] But Alabama Power installed far more 40-foot poles, dating back to before the JUA took effect in 1978. Mr. Arnett explains that "[s]ince at least 1966, a 40' class 5 pole has been designated as the standard for new joint use poles."[58] And in 1978 when the JUA took effect, 63.4% of Alabama Power's joint use poles were 40 feet or taller.[59] This data about pole height is

[54] See Affidavit of D. Miller, Apr. 16, 2019, ¶ 20 (hereinafter Miller Aff.); see also Affidavit of M. Peters, Apr. 16, 2019, ¶ 9 (hereinafter Peters Aff.).

[55] See Model CLEC Agreement, item 3.d ("Licensor *may* perform a Post-attachment Inspection at Licensee's expense."), item 6 ("Licensee shall submit facilities location maps with its applications to install Attachments, in accordance with the Policies and Procedures. Should Licensor provide the maps to Licensee, under the circumstances described in the Policies and Procedures, the amount to be paid by Licensee for the maps shall be as set forth in Exhibit B.")

[56] See JUA, Article VII(D).

[57] See JUA, 1984 Appendix B (APC000332-345 at 334).

[58] Arnett Decl. p. 9.

[59] See JUA, 1978 Appendix B (APC000321-330 at 323).

logical, as third-party attachments were common prior to 1978.[60] By 1977, there were 12.2 million CATV subscribers and many more homes passed in the United States.[61] In reaction to this development, in 1978, Congress enacted the Pole Attachment Act to guarantee CATV companies just and reasonable pole attachment rates. It is, therefore, not true that Alabama Power would not have installed 40-foot poles without the JUA. Mr. Metcalfe himself assumes that "Alabama Power *would* install [redacted] poles if it did not need to accommodate AT&T's attachments."[62]

35. The premise of Mr. Metcalfe's valuation also renders it irrelevant because Alabama Power's installation of 40-foot poles does not *competitively* advantage AT&T. A 40-foot pole can accommodate AT&T *and* its competitors, and in many cases, a 35-foot pole can as well.[63] It is therefore not sufficient, as Mr. Metcalfe states, to demonstrate that a joint use pole costs less than that pole built to only hold Alabama Power's attachments. The fact that Alabama Power installed poles that could accommodate other attachers applies equally to AT&T and its competitors. Thus, this is not a net competitive benefit.

[60] According to Alabama Power, "[T]he spec plates developed by the electric utilities and the 'Bell Telephone System' in the early years of joint use specifically account for third-party attachments such as trolley system conductors, street lighting systems, signal light systems, fire alarm circuits and police alarm circuits. The fact that the identity of today's attachers differs somewhat from the attachers of yesteryear is inconsequential." See *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, WC Docket No. 07-245, April 22, 2008, p. 12 (citing to the Declaration of Wilfred Arnett, April 22, 2008).

[61] See Kagan Research, *Broadband Cable Financial Databook*, 2005, p. 8.

[62] Metcalfe Aff., Ex. D-2.

[63] See JUA, Article VII(D); see also Peters Aff., ¶ 9.

36. Mr. Metcalfe's analysis is also significantly flawed. Make-ready costs are described as "any pole modifications required to attach to a pole, such as pole replacement *or rearranging existing attachments on a pole*."[64] He then bases his calculation only on the far costlier half of his definition, because "[p]er Pam Boyd" he assumes that, without the JUA, "AT&T would have paid make-ready costs to replace virtually all of Alabama Power's poles with taller poles."[65] Mr. Arnett's materials prove that this is untrue. He provided a 1972 document which states:

[redacted]

Mr. Metcalfe nonetheless assumes that AT&T would have replaced 100% of Alabama Power's poles.[67] At the same time, he fails to give AT&T any credit for the exceptionally high rental rates that AT&T *did* pay over the entirety of the JUA—rates that far exceeded the rental rates paid by AT&T's competitors.

37. Mr. Metcalfe also has no source data to support his pole replacement costs; he simply states that "[p]er Sherri Morgan, between 2014 and 2018, Alabama Power has paid on average approximately [redacted] per pole to replace its own poles throughout its pole network,"[68] a

[64] Metcalfe Aff., ¶ 14 fn. 13.

[65] Metcalfe Aff., Ex. D-4.1.

[66] Arnett Decl., Ex. E-14 at APC000227 (emphasis added).

[67] Metcalfe Aff., Ex. D-4.1.

[68] Metcalfe Aff., ¶ 31.

number that is absent from Ms. Morgan's Declaration. Mr. Metcalfe provides no additional information about the number, such as what tasks are included in this number and whether the replaced poles were non-joint use poles replaced with 40-foot poles for consistency with his theory. Nor does Mr. Metcalfe state that he tried to independently verify the information he was provided.

38. Mr. Metcalfe's use of the costs Ms. Morgan provided is flawed for another reason as well. He uses those costs, from the 2014 through 2018 time period, rather than historic costs. But Mr. Metcalfe's theory is that AT&T would have had to pay to replace Alabama Power's poles *when AT&T made its initial attachment*. Any such costs would have been incurred long ago. According to Alabama Power, AT&T was attached to 107,967 Alabama Power poles when the JUA took effect in 1978,[69] 277,782 Alabama Power poles by 1983,[70] 325,681 Alabama Power poles by 1990,[71] and 357,026 Alabama Power poles by 1994.[72]

3. Mr. Metcalfe Simply Repeats His Client's Claims About the Other Alleged Benefits

39. The remainder of Mr. Metcalfe's analysis is a mere repeat of his client's claims. He simply adopts his client's claim that AT&T should be assigned [redacted] feet of space on the pole, without original thought or analysis. With respect to Alabama Power's claim that AT&T "constructively" occupies [redacted] feet due to the inherent mid-span sag in its aerial facilities, it is not clear that Mr. Metcalfe understands what the measurement reflects, how it was taken, how few poles it reflects, or that it reflects space that is *not* on the pole. He simply states "[p]er Ms.

[69] Alabama Power Answer, Ex. 2 at APC000323.

[70] Alabama Power Answer, Ex. 3 at APC000334.

[71] Alabama Power Answer, Ex. 4 at APC000347.

[72] Alabama Power Answer, Ex. 1 at APC000316.

Morgan, I understand that AT&T uses an average of [redacted] feet *on* Alabama Power's JUA poles."[73] And with respect to the 3.33 feet of safety space, Mr. Metcalfe simply states that from "an economic cost-causation perspective under the current circumstances, it would be more equitable to allocate 100% of the safety space to the licensee."[74] It is unclear what Mr. Metcalfe means because he provides no analysis or explanation of his "economic cost-causation" analysis or the "current circumstances" to which he refers. Mr. Metcalfe does not seem to be aware that the FCC already considered this issue and ruled that the safety space must be allocated to the power company, and not the communications attacher, when calculating rates.[75]

40. Mr. Metcalfe also repeats his client's previous claims of an "incumbent position," favorable liability sharing provisions, avoided insurance, and the lowest position on the pole.[76] Mr. Metcalfe does not quantify the value of any of these alleged benefits. Again, he only references discussions with Ms. Morgan and Ms. Boyd, who provide no support for this information in their declarations, and a letter sent by Alabama Power during this dispute.[77] Mr. Metcalfe adds no value to the discussion.

41. Mr. Metcalfe also advances an extension of the "incumbent position" theory, under which he claims AT&T could enter a geographic area served by Alabama Power faster

[73] Metcalfe Aff., ¶ 39.

[74] Metcalfe Aff., ¶ 34.

[75] See *Pole Attachment Order*, ¶ 192; see also ibid, ¶ 180 fn. 559 (quoting *Consolidated Partial Order*, ¶ 51 as "finding that 'the presence of the potentially hazardous electric lines … makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers,' and further that this 'space is usable and is used by the electric utilities'").

[76] See Metcalfe Aff., Section V.

[77] Ibid.

than its competitors, if that area is "without any AT&T, CLEC, or CATV attachments."[78] This is sheer speculation as Mr. Metcalfe only cites news articles about poles *with* communications attachments to support his theory about poles *without* communications attachments. He also fails to disclose that the issues he identifies were ameliorated by the FCC when it adopted its one-touch make-ready reforms.[79] Moreover, such areas would typically represent entire new builds in which Alabama Power also needs to extend service to the area. Mr. Metcalfe unrealistically assumes that, in doing so, Alabama Power would not coordinate new builds with all of its attachers so that they can timely attach, even though its license agreements state that it will "endeavor" to provide its licensees "notice of planned new construction of distribution poles to which Licensee is not attached."[80] He also unrealistically assumes that major CATV providers in Alabama, such as Charter (d/b/a as Spectrum), Comcast, and Cox Communications, would not be prepared to quickly deploy into a new build area.

42. Finally, Mr. Metcalfe states only that there "may be" benefits from AT&T's position as the lowest position on the pole, but acknowledges that AT&T has provided evidence about the disadvantages associated with that position.[81] He also claims that AT&T benefits from liability sharing, insurance, and security bond terms, but does not identify any such difference.[82] And, even if there were a difference, Mr. Metcalfe ignores the reciprocal benefits that Alabama Power receives from AT&T as part of the JUA—obligations that are not imposed on AT&T's

[78] Metcalfe Aff., ¶ 40.

[79] See *Third Report and Order* ¶ 2.

[80] Alabama Power Answer, Ex. 5 ¶ 14.

[81] Metcalfe Aff., ¶ 48.

[82] Metcalfe Aff., ¶¶ 46–47.

competitors.[83] In any event, because Mr. Metcalfe has not quantified the value of any of these alleged advantages, they are not germane to the analysis. He therefore failed to identify any net material competitive benefit that justifies a departure from the FCC's new telecom rate formula.

B. Mr. Arnett's Arguments Are Irrelevant And Selective

43. Alabama Power claims that Mr. Arnett has provided sufficient evidence to justify the JUA rates, but his Affidavit does not quantify the value of any alleged competitive benefit. Instead, Mr. Arnett offers his own outdated and incorrect views of issues that are irrelevant to a determination of the just and reasonable rate for AT&T's use of Alabama Power's poles.

1. Mr. Arnett's Claims Are Meaningless

44. Mr. Arnett offers a series of convoluted claims that offer little value, if any, to the resolution of this dispute. First, Mr. Arnett seems to think that this is a dispute about a contractual interpretation of the JUA, which it is not. Thus, his historical perspective, including the unsupported claim that "[a]s early as 1945, street lighting could be installed" on "the other 'unallocated' portion of the pole" does not solve the question of whether the JUA's pole attachment formula presently produces just and reasonable rates that are competitively neutral.[84] Equally uninformative is Mr. Arnett's finding that between 2017 and 2018, "AT&T added 82 trench kilometers of conduit and 480 kilometers of duct."[85] Although it is unclear what Mr. Arnett is attempting to show with this finding, he seems to imply that AT&T does not need to attach to Alabama Power's poles. But AT&T's need to access Alabama Power's poles is irrelevant to the rate to which it is entitled – the right to just and reasonable rates that are

[83] Dippon Initial Affidavit, ¶ 35.

[84] Arnett Decl., p. 11.

[85] Ibid, p. 4.

competitively neutral is not based on need. And, in any event, Mr. Metcalfe has shown how reliant AT&T is on Alabama Power's poles with his attempts to quantify a replacement network.

45. Second, despite Mr. Arnett's reportedly "almost 53 years" of experience with pole attachment rates,[86] he completely ignores the FCC's multiple orders on this topic, including the 2011 order,[87] the 2015 order,[88] and the recent 2018 order.[89] Mr. Arnett offers no explanation as to why he thinks the JUA rates are just, reasonable, and competitively neutral. Rather, Mr. Arnett makes a selective historical claim based on a 1972 document that purports to show that the JUA may have been [redacted][90] I address Mr. Arnett's use of this document below; however, I must note that none of his material establishes that the JUA formula provides just and reasonable rates *today* or that it has produced such rates since 2011 when the FCC recognized the right of ILECs to such rates.

46. Third, Mr. Arnett takes issue with Ms. Miller's statement that AT&T was not the cause of Alabama Power's 40-foot poles because Alabama Power would have installed 40-foot poles to accommodate other attachers.[91] Mr. Arnett, however, actually agrees with Ms. Miller, because he states that "[s]ince at least 1966, a 40' class 5 pole has been designated as the

[86] Ibid, p. 1.

[87] See Pole Attachment Order.

[88] See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, 30 FCC Rcd 13731 (2015) (hereinafter *Cost Allocator Order*).

[89] See Third Report and Order.

[90] Arnett Decl., p. 12.

[91] Ibid, pp. 8, 10.

standard for new joint use poles"[92] irrespective of whether they would be jointly used by AT&T or some other communications attacher. In addition, Mr. Arnett implies that Alabama Power would intentionally install shorter poles just so it could charge CATV and CLEC attachers to incur the full cost of a taller replacement pole, as he states that "[w]hen third-party attachers need space on Alabama Power's poles, they are responsible for the total actual costs."[93] This is not only highly inefficient and socially undesirable, it contradicts the very concept Mr. Arnett claims is followed in network planning where "the poles … should be designed for 'ultimate needs.'"[94]

47. Fourth, Mr. Arnett provides an opinion about the allocation of safety space on Alabama Power's poles without once mentioning that the FCC already ruled that the safety space must be allocated to Alabama Power, as detailed in paragraph 39 above.

48. Fifth, Mr. Arnett fails to answer the question of what constitutes a just and reasonable rate. Rather, he engages in a convoluted discussion as to why he thinks each party should pay its "fair share" as he thinks they viewed that concept in 1978.[95] But the dispute is not about Mr. Arnett's views of fairness, it is about whether the rate Alabama Power charges *all* of the attachers on its poles is just, reasonable, and competitively neutral under the standard set by the FCC. Mr. Arnett never answers that question, never cites federal law, and relies only on rental rates imposed by municipal utilities and electric cooperatives that are *not* subject to the federal just and reasonable rate requirement.[96] Mr. Arnett's declaration thus adds nothing to the analysis of the issue in dispute.

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[92] Arnett Decl. p.9.

[93] Ibid, p. 10.

[94] Ibid, p. 4.

[95] Ibid, pp. 12-14.

[96] Ibid, pp. 13-14.

2. Mr. Arnett's 1972 Bell System Practice Does Not Support the Contention that Alabama Power's Rates Are Just and Reasonable and Competitively Neutral

49. Mr. Arnett argues that the rate provision in the 1978 JUA must be equitable because a 1972 Bell System Practice (BSP) purportedly [redacted] percentages that are close to those [redacted] and [redacted] percentages contained in Appendix B to the JUA.[97] There are several serious problems with Mr. Arnett's inference.

50. First, an outdated BSP about rates over 45 years ago says nothing about whether the pole attachment rates that Alabama Power charges AT&T today are just, reasonable, and competitively neutral. It is an understatement to say that much has changed in the industry overt his period, particularly in the last 10 years or so.

51. Second, the numbers in the BSP are stylized, as the document states that it uses [redacted][98] Hence, Mr. Arnett's observation that the percentages in the JUA are [redacted] is mere coincidence and not an admission of fairness. In fact, Mr. Arnett relies on a cost allocation methodology in the BSP that is entirely different from that employed in the 1978 JUA. The BSP defines the [redacted] as:

[redacted]

[97] Ibid, pp. 12-13.

[98] Bell System Practices, AT&TCo Standard, Section 937-217-126, Division of Cost Methods In Formulating Joint Use Agreements, Issue 1, September 1972, Section 2.02 (hereinafter BSP).

[99] BSP, Section 5.01.

The 1978 JUA and subsequent amendments differ entirely, as they do not include any consideration of "nonjoint construction." Rather, the JUA Exhibits B in 1978 and 1984 rely on the cost of the companies' respective *joint use poles* for the rates, while the rate provision adopted in 1990 and continued in 1994 states that rates are based on "[t]he average embedded pole cost (PC) for each party [which] shall be computed annually based on actual pole cost experience. The computations shall be made by dividing the total investment in distribution wood poles by the total quantity of distribution wood poles." [100] Thus, whereas the BSP arrives [redacted], the actual agreements between Alabama Power and AT&T allocates the costs of joint use poles only.

52. Third, the JUA did not promise cost savings for AT&T but rather recognized that joint use was often a necessity as [redacted] [101] The BSP also recognizes that given [redacted] [102] In fact, the BSP recognizes that joint use [redacted].[103]

[100] 1978 JUA, App'x B, p. 1 and Exh. 6; 1984 App'x B, p. 1 and Exh. 5; 1990 App'x. B; 1994, App'x. B.

[101] Cost Methods, Section 1.04.

[102] Cost Methods, Section 1.04.

[103] Ibid, Section 1.08.

53. Finally, contrary to what Mr. Arnett portrayed, nowhere in the BSP does AT&T say that it is content with the [redacted]. Rather, the BSP is a [redacted]"[104] That did not mean that the cost-sharing methods then being confronted by negotiators produced just and reasonable rental rates or would be relevant for all time. The BSP is from 1972 and there is no reason to believe, let alone mention in the BSP, [redacted]. Given the market developments since 1978, in which CATV, CLEC and wireless attachers provide an additional revenue source to Alabama Power as a pole owner, it is highly unlikely that anyone would describe a [redacted] if it ignored this revenue from CATV, CLEC and wireless attachers. In contrast, and as discussed in my Initial Affidavit, it is the FCC's new telecom formula that is the "equitable" cost-sharing methodology today. That is, the FCC's new telecom rate specifically accounts for market developments (e.g., an increased number of communications attachers) and reflects several other real-world realities (including allocating the safety space to the power company). Hence, it presents an economically superior outcome and it aligns with AT&T's stated desire in 1972 for an equitable cost-sharing arrangement.

IV. ALABAMA POWER'S AND MR. METCALFE'S CRITICISMS OF MY TESTIMONY ARE MISDIRECTED

54. Alabama Power in large part ignores my Initial Affidavit, claiming that my "entire" Affidavit "depends upon the premise that the original [JUA] was the result of unequal

[104] Cost Methods, Section 1.02.

bargaining power…."[105] First, my Initial Affidavit explains that Alabama Power has been able to impose and continue charging the JUA rates because it has exercised the advantage provided by the parties' unequal pole ownership numbers. The reason why the JUA rates persist is additional to my detailed evaluation that establishes that the JUA rates themselves are not just and reasonable and competitively neutral. Second, Alabama Power's own evidence confirms that the original 1978 JUA *was* the result of unequal bargaining power. It appended the 1978 version of the rate formula to its Answer, and it states that Alabama Power owned 85.9% of the jointly used poles when the JUA was initially entered.[106] As is revealed by Mr. Metcalfe's attempt to quantify AT&T's costs in a world of no joint use poles, Alabama's pole ownership advantage created unequal bargaining power.

55. Mr. Metcalfe also briefly appends criticisms of my Initial Affidavit to the end of his Affidavit. The gist of his criticisms is the same as that advocated by Alabama Power, specifically that the JUA rates are just and reasonable because they did not result from unequal bargaining power.[107] This non-factual assertion is no more credible when made by Mr. Metcalfe. The 1978 JUA was entered when Alabama Power owned the vast majority of the joint use poles.[108] The current rate formula took effect in 1994, when Alabama Power had a more than two-to-one pole ownership advantage (68% vs. 32%).[109] And the disparity has since widened so that Alabama Power owns 78% of the utility poles that it shares with AT&T.[110]

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[105] Alabama Power Answer, ¶ 30 fn 104.

[106] Alabama Power Answer, Ex. 2 at APC000323.

[107] Metcalfe Aff., ¶¶ 52-56.

[108] See JUA, 1978 Appendix B (APC000321-330 at 323).

[109] See JUA, 1994 Appendix B (APC000316-319 at 316).

[110] 2018 Invoice.

56. Mr. Metcalfe fails to mention the numerous analyses conducted by the FCC regarding bargaining power in the context of pole attachments.[111] As a result, he fails to note that AT&T falls squarely within the example that the FCC provided when it found that "market forces" were not alone sufficient to ensure just and reasonable rates because "electric utilities appear to own approximately 65-70 percent of poles."[112] In addition, Mr. Metcalfe, as described above, confirms that Alabama Power's pole ownership advantage gives it the negotiating advantage that the FCC recognized, as he calculates the replacement cost that AT&T would have to incur absent joint use with Alabama Power—and shows AT&T's costs would far exceed those incurred by Alabama Power in that scenario.[113] Alabama Power and Mr. Metcalfe thus confirm and reinforce the FCC's decision to ensure that pole attachment rates are just and reasonable and competitively neutral because "the marketplace evidence" shows that "market forces and independent negotiations" are not here "sufficient to ensure just and reasonable rates, terms and conditions" for AT&T's use of Alabama Power's poles.[114]

V. CONCLUSION

57. I have carefully reviewed and considered Alabama Power's Answer, including Mr. Metcalfe's affidavit and Mr. Arnett's declaration. I find that the arguments Alabama Power presented are contrary to the FCC's deployment and competition goals and that the work of its consultants is deeply flawed and of little (if any) value to the present matter. My conclusion remains that the pole attachment rates that Alabama Power has charged AT&T since 2011 have not been and will not be just and reasonable or competitively neutral rates. I recommend that the

[111] There is no mention of the FCC in Mr. Metcalfe's affidavit.

[112] *Pole Attachment Order*, ¶ 206.

[113] See Metcalfe Aff., ¶¶ 19-24.

[114] See Pole Attachment Order ¶¶ 199, 208.

FCC set the just and reasonable rate for AT&T's use of Alabama Power's poles as the properly calculated per pole new telecom rate because Alabama Power has not shown that AT&T receives net benefits under the JUA that provide it a material advantage over its CLEC and cable competitors.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 19th day of July 2019.

Christian M. Dippon, Ph.D.